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IN THE

Supreme Court of the United States

October Term, 1958

No. 596

MICHAEL STELLA, suing on his own behalf and on behalf of all other stockholders of Kaiser-Frazer Corporation similarly situated,

Petitioner,

against

GRAHAM-PAIGE MOTORS CORPORATION and KAISER-FRAZER CORPORATION,

Respondents.

BRIEF OF RESPONDENT GRAHAM-PAIGE MOTORS CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMBROSE V. McCALL,
Attorney for Respondent, Graham-Paige Motors Corporation,
63 Wall Street,
New York 5, N. Y.,
Telephone: WHitehall 3-8640.

WM. FRANCIS CORSON,
SOL. I. SOKOLSKY,
of Counsel.

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MICHAEL STELLA, suing on his own behalf and on behalf of all other stockholders of Kaiser-Frazer Corporation similarly situated,

Petitioner,

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GRAHAM-PAIGE MOTORS CORPORATION and KAISER-FRAZER CORPORATION,

Respondents.

BRIEF OF RESPONDENT GRAHAM-PAIGE MOTORS CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement

Plaintiff, a stockholder of Kaiser-Frazer Corporation,[1] sued in the right of KF to recover "insider short swing" profits allegedly realized by the defendant Graham-Paige Motors Corporation,[2] also a KF stockholder, pursuant to Sec. 16(b) of the Securities Exchange Act of 1934, 15 U. S. C. Sec. 78p(b).

Upon the trial, judgment went for defendants. (132 F. Supp. 100) On the first appeal to the Court of Appeals

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[1] Herein called KF.

[2] Herein called GP.

(232 F. 2d 299), that judgment was reversed. The ground of the reversal was that the Trial Court had determined that the burden of proof was upon the plaintiff to establish that profits had actually been realized in the transaction, whereas the Court of Appeals felt that it was the defendant's burden, under the circumstances, to establish the converse, namely, that no profits were actually realized.

In its first opinion the Court of Appeals said,

> "However, since it is not entirely clear what the judge would have found—as to whether Graham-Paige discharged its proof-burden—had he read the foregoing, [referring to this court's ruling on the question of burden of proof] in the interest of justice we remand with directions that he make a specific finding on that issue, in the light of what we have said above."

The matter was resubmitted to the Trial Court upon the original record and judgment was again rendered in favor of the defendant, GP (149 F. Supp. 390). The District Court, applying the law as stated by the Court of Appeals on the first appeal that the burden of proving the absence of actual profit was upon GP, found that GP had sustained that burden.

The three opinions mentioned above are printed in the appendix to this brief.

The Trial Court's Original Decision

In order for the Trial Court to reach its first decision under its view of the burden of proof, it was necessary only for the Court to find that plaintiff had not proved a profit. It was not necessary for the Court to find that GP had proved the absence of a profit. Upon remand, under the direction of the Court of Appeals, the Trial Court was required to specifically find that GP had, or had not, proved the absence of a profit.

The Trial Court in its original decision *did* * find that GP's proof rose *at least* to the level of the plaintiff's proof. For if GP's proof had not risen *at least* to the level of the plaintiffs, the latter would have preponderated, and judgment would have gone for the plaintiff. The basis of the Court's first judgment for the defendant was that GP's evidence *at the least* created an equilibrium of proof, and believing that the burden of proof was on plaintiff, it gave judgment to defendant.

In his original decision the Trial Court had the following to say as to the weight of the evidence, 132 F. Supp. at 108:

> "Plaintiff did not attempt to adduce any evidence contrary to that adduced by Graham-Paige, but satisfied himself with attacking Graham-Paige's evidence through cross-examination of Graham-Paige's witnesses and argument in his brief submitted after trial. Thus plaintiff chose to rely upon the eventuality that I would refuse to give credence to the substantial amount of evidence adduced by Graham-Paige in opposition to plaintiff's prima facie case."

And at page 109 said:

> "Plaintiff's prima facie proof of the value of the exchanged assets and the nonstock package items has been shown to be unacceptable."

Issue Upon the Remand

The question upon remand, in view of the Court of Appeals statement that GP had the burden of proving that it made no profit was whether the level of GP's proof *exceeded* that of the plaintiff's. The Trial Court found upon the remand that GP's evidence preponderated, and that not only did GP satisfy its burden of proving the absence of a profit but proved that it lost $671,150. Judgment went, as before, for defendant. From this judgment that plaintiff again appealed to the Court of Appeals.

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* Emphases ours here and throughout unless otherwise noted.

The Second Appeal

On the second appeal the petitioner complained that the Trial Court, on the remand, had failed to follow the directions of the Court of Appeals and had erroneously determined the facts. The Court of Appeals considered, and in its second opinion discussed, the facts at length. In its unanimous decision, Judge Waterman concurring in the result, the Court found (259 F. 2d at 480):

> "The trial court following the directions of this court carefully analyzed the evidence to determine whether GP had satisfied its burden of proof that no profit was realized. He found as a result of certain assumptions and calculations that the cost of the 750,000 shares to GP was $11.08 a share and that instead of a profit a loss of $4.33 a share was suffered."

and held (id. at 482):

> "We believe that GP has sustained the burden of proof that there was no such profit and accordingly affirm the judgment."

Summary of Argument

The first question which petitioner seeks to present is whether some supposed representations, which he asserts the respondent made prior to the action, judicially estop the respondent from taking an allegedly inconsistent position in the action. However, both the Trial Court and the Court of Appeals have made express findings of fact, reported in their opinions, that the respondent did *not* make the representations alleged by the petitioner, and did *not* take inconsistent positions. Petitioner, after a trial, appeal, remand and second appeal, now wants the Supreme Court to re-try the case on the facts and find them to be different from the lower courts' findings. Even if, however, the respondent had made representations inconsistent with the

position it took in the action (which the courts below found it did not do), there would still be no estoppel here as a matter of law.

As to the second question which the petitioner presents, the assertions of fact on which he relies as the premise for his question, are contrary to the facts found by both lower courts. Accordingly, here too, the Supreme Court would have to reverse both of the lower courts' findings of fact in order to consider the question posed by petitioner. He is again asking the Supreme Court to re-try the facts.

He furthermore incorrectly states the basis of the lower courts' decisions. The Trial Court, which was unanimously affirmed in the Court of Appeals, found that the respondent had made no profit. In arriving at this finding the courts below properly applied the law of valuation.

There is no dispute, either intracircuit or intercircuit, concerning the law to be applied in determining whether the respondent made a profit.

Where the only purpose of review by the Supreme Court would be to weigh the evidence and re-try the facts found by the Trial Court and affirmed by the Court of Appeals, no reason is presented for review by this Court.

POINT I

The first question petitioner seeks to present is not reached unless this Court first reverses the lower courts on the facts and even then the law is not as petitioner claims.

The first question which petitioner seeks to present is whether some supposed representations, which he accuses the respondent of having made prior to the action, judicially estop the respondent from taking an allegedly in-

consistent position in the action. However, both the Trial Court and the Court of Appeals have made express findings of fact, reported in their opinions, that the respondent did *not* make the representations alleged by petitioner, and did *not* take an inconsistent position in the action. Petitioner, after a trial, appeal, remand, and second appeal, now wants the Supreme Court to re-try the case on the facts. Upon the facts found the alleged question of estoppel is not presented.

On page 3 of his petition, petitioner precedes his first question with three sentences of *alleged facts*, and commencing on page 9 he recites almost eight pages of alleged "Facts as to Estoppel", but does not advise this Court that the "facts" as he proposes them with respect to estoppel are directly contrary to the facts found by the lower courts.

In his original opinion, Judge Dimock devoted much attention to the factual allegations on which petitioner bases his claim of estoppel, and found as follows:

"VI.

"ESTOPPEL

"Plaintiff urges that Graham-Paige, by its reports of a profit to its stockholders, the SEC, the New York Stock Exchange and the Bureau of Internal Revenue, is estopped to deny that it realized a profit from the sale of stock.

"Graham-Paige admits that in a number of its records a profit item appears and is attributed to the stock sale at issue. These records may properly be considered as some evidence that a profit was realized and I have so considered them. Plaintiff goes further and says that Graham-Paige should not be permitted to now deny the correctness of the profit item.

"While the prior statements were some evidence that Graham-Paige made a profit, they were not

made in a form which would conclusively estop the declarant from denying that a profit was made, so that even assuming that some sort of estoppel would be operative if the statements had been wholly inconsistent, a very large assumption I believe, no estoppel can be applied here.

"On each of the documents upon which plaintiff relies with one exception, Graham-Paige's 1947 tax return, there appeared a note which called attention to the fact that the figure booked as the cost to Graham-Paige of the stock which it acquired was an 'assigned value'. Further, in the financial statements in which the stock purchase was outlined it was pointed out that both the market price and Graham-Paige's net equity in Kaiser-Frazer represented by the stock were higher than the 'assigned value' of the purchased stock. In view of the fact that this 'assigned value' was derived merely by subtracting the face amount of the debentures which Kaiser-Frazer had promised to pay from the book value of the tangible and deferred assets given by Graham-Paige, and in view of the fact that it was expressly noted that the remainder was less than either the market value of the stock received or the net equity in Kaiser-Frazer which the stock represented, it is impossible for me to say that Graham-Paige represented that the remainder of the above-mentioned calculation was, in fact, the cost of the stock which it acquired. It follows that the recording of a profit based on this 'cost' was no representation that a profit, in fact, had been realized.

"It is quite true that Graham-Paige, in its return for 1947, reported a capital gain on the sale of the stock. This statement of a profit was, of course, unqualified. While at first glance this willingness to pay tax on a profit attributable to the sale of stock seems inconsistent with Graham-Paige's present position, study of the surrounding factors reveals that this apparent inconsistency is unreal. The intangibles which Graham-Paige has urged were a part of the consideration given by it were all derived from its efforts to re-establish itself in the automo-

bile business after World War II. There were expenditures, for example, for advertising, design and establishment of a dealer system. These expenditures began very late in 1944 or early 1945. It appears that during these years the situation so far as Graham-Paige's automobile business was concerned was one of substantial amounts of money going out and nothing coming in. Production in quantities large enough to be profitable was not attained at the Willow Run plant until 1947 and, by February 1947, Graham-Paige had sold its automobile business to Kaiser-Frazer, its former partner in the Willow Run operation. As a result the expenditures, which Graham-Paige had made in 1945 and 1946 and now claims to have created valuable intangible assets, were reported as losses and expenses during those years for tax purposes. From the tax point of view it would have been improper for Graham-Paige to include in the consideration given for the stock any figures representing intangible assets since it had already deducted the sums expended in the creation of such assets from past income. Thus the fact that Graham-Paige's income tax profit differed from its actual profit is no more than an example of a phenomenon familiar to all.

"Since I find that none of the statements cited by plaintiff are inconsistent with Graham-Paige's present position, Graham-Paige cannot possibly be estopped to make its present stand."

On the first appeal, petitioner, as appellant, claimed errors of both fact and law with respect to estoppel. The Court of Appeals did not expressly rule on the claim of estoppel, but a holding that the respondent was *not* estopped was inherent in that Court's opinion, because the Court remanded the action to the trial court with specific instructions to find whether the respondent had proved the absence of profit. Such remand and instructions would not have been made if the Court of Appeals had considered the respondent estopped from making such proof. The fact that the Court expressly instructed the trial judge to con-

sider and weigh the respondent's proof constitutes an inherent finding by it that such proof was not estopped.

The Court of Appeals so held in its second opinion:

"There remains for consideration appellant's argument that GP by its own figures and published statements has estopped itself against using any other cost figure than $3.94 a share. The fact that GP placed this figure on its books and even paid a profits tax based upon the difference between $3.94 and $6.75 per share the sale price of the 155,000 shares was the supporting reason for this court's previous declaration that appellant had made a prima facie case, thus shifting the burden to GP (232 F. 2d 299). Appellant points to representations in GP's proxy statement on the subject of assets to be transferred, a registration statement and prospectus in 1947, GP's 1947 annual report and its 1947 Federal income tax return, all as declaring a profit on the sale of the 155,000 shares.

"This claim of estoppel was raised before Judge Dimock on the original hearing and rejected by him. Appellant then asserted this rejection as a ground for reversal on his first appeal to this court. Although this court did not explicitly rule on the point, by necessary implication it held against appellant because, had it considered appellant's position to be sound, it would have been compelled to have directed entry of judgment for him and would not have remanded for the purpose of forcing GP to prove the very facts which appellant claimed GP was estopped from asserting.

"Apart from this fact, appellant's point examined independently is lacking in merit. Appellant concedes that these statements could not create a collateral estoppel and that they did not create an estoppel *in pais*, or equitable estoppel, because neither KF nor its shareholders relied upon the statements. *Jelliffe* v. *Thaw*, 2 Cir., 1933, 67 F. 2d 880.

"Appellant's theory is that the so-called doctrine of 'judicial estoppel' concerning inconsistent state-

ments made in prior litigation likewise encompasses extrajudicial statements made to governmental agencies, here the S. E. C. and Internal Revenue Service. Appellant then argues that the important federal policies embodied in the tax and securities laws dictate such a conclusion.

> "The doctrine of judicial estoppel, as urged here, would extend estoppel beyond all reasonable bounds. In finding facts in a law suit the business of the court is to determine the truth or falsity of the controverted propositions of fact. Collateral estoppel, or estoppel by judgment, was not developed to render immutable all statements or pronouncements of litigants but to protect the parties from the expense, delay, and harassment attendant upon having to prove *de novo* a fact already established in an action between the same parties or their privies."

The significant feature of the above findings by the lower courts is that they constitute findings of fact which preclude the legal question presented by the petitioner from arising.

The lower courts' findings of fact were well founded.

Plaintiff's claim of estoppel rests upon bookkeeping profit items based on assigned values contained in certain financial statements and accounts of GP. Typical items upon which plaintiff relies are those which form a part of GP's 1947 Annual Report to Stockholders, its 1947 Annual Report (Form 10K) to the SEC and GP's 1947 Income Tax Return.

That bookkeeping item appears in said financial statement as follows:

> "Profit on sale of portion of investment in capital stock of Kaiser-Frazer Corporation (Note 4)—$434,787.86."

That item contains the parenthetical reference "(Note 4)".[1]

[1] Note 4 to the Stockholders Report is note 5 to the 10-K, and note 2 to the Stockholders Report is note 3 to the 10-K.

Note 4 to such financial statement is contained both in the 1947 Annual Stockholders' Report and the 1947 (10-K) SEC Report.

Note 4 reads, in material part, as follows:

> "The investment of $4,847,224.06 in Kaiser-Frazer Corporation at December 31, 1947 consisted of 275,000 shares of common stock of that company and voting trust certificates for 570,000 shares. 250,000 shares were purchased for $2,500,000 cash and the remaining 595,000 shares, carried at $2,347,224.06, were acquired in connection with the sale of the Corporation's automotive assets as set forth in Note. 2. According to information received, such shares constituted slightly less than 18% of the outstanding stock of Kaiser-Frazer Corporation at December 31, 1947 and the amount at which they are carried is substantially less than the Corporation's equity in the net assets of Kaiser-Frazer Corporation as shown by that company's books at that date, and also less than the value based on market quotations for that date."
>
> • • •
>
> "In August 1947 the Corporation sold 155,000 shares (V. T. C.) of Kaiser-Frazer Corporation stock which were released from the voting trust agreement (of which 100,000 shares were sold to Permanente Metals Corporation, a corporation controlled by Henry J. Kaiser interests) at $6.75 a share, the proceeds amounting to $1,046,250. The cost of the shares sold was determined on the basis of *the value assigned* to the 750,000 shares commented upon in Note 2, resulting in the gain of $434,787.86 shown in the accompanying statement of income."

Note 4 refers to and incorporates Note 2 which reads as follows:

> "Under date of December 12, 1946 the Corporation entered into an agreement with Kaiser-Frazer Corporation whereby it agreed, among other things, to sell and/or transfer to that company as of January 31, 1947 (1) all of the automotive assets owned by the Corporation and its wholly owned subsidiaries; (2) all accounts receivable arising out of the automobile business; (3) the sum of $3,000,000; and (4) an

amount equal to $1,250,000 plus amounts of automobile accounts payable and less automobile accounts receivable. In consideration of the foregoing, Kaiser-Frazer Corporation agreed to (1) pay principal and interest on the Corporation's $8,524,000 principal amount of 4% convertible debentures, due April 1, 1956; (2) issue 750,000 shares of its common stock to the Corporation; and (3) assume all of the Corporation's liabilities which arose out of the automobile business at Willow Run. The agreement also provided that the 750,000 shares of Kaiser-Frazer Corporation common stock to be received by the Corporation would be placed for two and one-half years in a voting trust of which Mr. Henry J. Kaiser and Mr. Joseph W. Frazer are voting trustees. The agreement was approved by the Corporation's stockholders at a meeting held February 5, 1947, and the sale and transfer was completed on February 10, 1947, subject to later adjustments."

The transaction as consummated is summarized as follows:

Assets transferred:	
Net current assets (including $4,170,177.82 cash)	$ 4,295,302.48
Investment in and advances to Kaiser & Frazer Parts Corporation (less reserve)	268,005.17
Fixed assets (net)	6,181,723.94
Deferred assets—advertising, design, development, and engineering costs, etc.	737,654.61
Total	$11,482,686.20
Deduct—4% convertible debentures, due April 1, 1956 (principal amount), to be paid by Kaiser-Frazer Corporation	8,524,000.00
Value assigned to 750,000 shares of Kaiser-Frazer Corporation common stock received by Graham-Paige Motors Corporation	$ 2,958,686.20

Although the intangibles transferred by GP to KF were of great value, they were not carried (and according to conservative bookkeeping practices should not have been carried) as capital assets on the books of GP. All that GP carried on its books were its net current, fixed and deferred assets. These totalled $11,482,686.20 (Ex. 29, p. 10, Note 2).

For bookkeeping purposes GP credited against these assets at the time of their transfer the face amount of the outstanding GP debentures which KF agreed to pay, that is, $8,524,000. This left a balance of the value of *tangible* assets transferred, over the amount of the assumed obligations of $2,958,686.20 which was carried on GP's books as "*Value assigned* to 750,000 shares of Kaiser-Frazer Corporation common stock received by Graham-Paige Motors Corporation".

By dividing this assigned value by the number of shares acquired, a *bookkeeping* cost per share was obtained which resulted in the *bookkeeping* profit of $434,787.86 upon which plaintiff relies.

That this was only a bookkeeping profit based upon arbitrarily assigned values is made apparent in Note 4 (Ex. 29, p. 10) where it is said "In August 1947 the corporation sold 155,000 shares (V. T. C.) of Kaiser-Frazer Corporation stock * * * at $6.75 a share, the proceeds amounting to $1,046,250. The cost of the shares sold was determined on the basis of the *value assigned* to the 750,000 shares commented upon in Note 2, resulting in the gain of $434,787.86 shown in the accompanying statement of income."

Further evidence that the assigned value of the shares was not their real cost to GP or their real value is found in an earlier part of the same Note 4 where this statement is made:

> "* * * the amount at which they (such shares) are carried is substantially less than the Corporation's

> (GP's) equity in the net assets of Kaiser-Frazer Corporation as shown by that Company's books at that date, and also less than the value based on market quotations for that date."

There is no variance between the position now taken by GP as to the actual cost of KF stock and the position which it has always taken with respect to it. Plaintiff has chosen to read only part of the statement to which it refers and to ignore the explanatory notes which are appended to the financial statements of GP and are a part of them.

Neither did Graham-Paige make any representations to the Bureau of Internal Revenue inconsistent with its position on the trial. Petitioner contends that Graham-Paige made a taxable profit either on the initial exchange of assets for stock or upon the subsequent sale of stock for cash. This statement is false. The proof shows that GP did not realize a profit on the sale of either the stock or the assets.

Even if it were true (which it is not) that GP realized a profit on the exchange of the assets, such profit would not establish liability under Section 16(b). Profit would be actionable under Section 16(b) *only* if it were realized on the sale of the stock. Stock profits are the only ones within the purview of the section. It would make no difference even if profits were made on the sale of assets prior to the time GP owned the stock. Therefore, the contention that profits were made either on the sale of the stock or on the prior disposition of the assets is of no help to plaintiff in this case.

The Court of Appeals on the second appeal so held in this language:

> "Nor is it necessary to decide whether or not profits might have been made on the sale of the assets. That question is not before us. The sole issue is whether there was a profit on the sale of stock within the purview of section 16(b)." (259 F. 2d 476, 482).

It does not follow, as plaintiff seems to think, that the only way that GP can prove that it did not make a profit on the sale of the stock is to prove that it did make a profit on the sale of the assets. It has been established that GP lost money all along the line.

In fact, petitioner has expressly conceded that the Trial Court was correct in finding that GP had had losses which were charged off as costs and expenses, which had previously been deducted in prior tax returns; and that on the 1947 return they could not be used as a loss since to do so would result in a double deduction. The entire transaction is spread over the returns for four taxable years, 1944, 1945, 1946 and 1947, and it is necessary to view those four returns as a whole to properly reflect the entire transaction. The four returns taken together show a very large loss. The testimony of Mr. Koebel shows that, and KF acknowledged it in Exhibits A and P. Koebel testified that even if a profit could result tax-wise from the 1947 transactions, it was wiped out by the losses from the 1944, 1945 and 1946 operations. Thus, no tax would have resulted after integrating all of the taxable years. However, even if there had been *taxable profits* that would not have established any *actual profits* under §16(b).

The inconsistency claimed by the plaintiff is non-existent.

An examination of the evidence, both oral and written, establishes that no other finding could have been correctly made.

However, assuming, contrary to the fact, that GP were now taking a position inconsistent with a prior position, there would be no estoppel, as a matter of law, because the legal requisites of estoppel are absent.

Estoppel in pais, otherwise known as equitable estoppel, is inapplicable to this action, because of the absence of

reliance and injury.[1] Plaintiff, however, claims "judicial estoppel". But plaintiff concedes that judicial estoppel relates to representations made in *prior litigation*. The Brooklyn Law Review article[2] to which plaintiff refers, bears the title and is limited to "Estoppel Against Inconsistent Positions in *Judicial Proceedings*". The authorities cited by plaintiff relate, by his own admission, to "a statement made *in court*". Each of them involved inconsistent positions taken in previous judicial proceedings.

In the action at bar there were no prior judicial proceedings. The doctrine of judicial estoppel is therefore inapplicable in this case.

Plaintiff attempts to distort and extend the doctrine to representations allegedly made to the SEC on the authority of *Lewis* v. *Atlas Corp.*, 158 F. 2d 599, 602 (3rd Cir.). That case, however, dealt with a position previously taken during a *quasi-judicial* administrative *hearing*, while the position alleged to have been taken by GP with the SEC was not at any administrative, judicial, *quasi-judicial* or other hearing or proceeding of any kind.

The lower courts clearly distinguished *Dietrick* v. *Greaney*, 309 U. S. 190, 84 L. ed. 694, cited by petitioner. As the Trial Court said in its first opinion:

> "Plaintiff cites Deitrick v. Greaney, 309 U. S. 190, as a case which controls in the circumstances here.

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[1] *State of Missouri* v. *Missouri Utilities*, 96 S. W. 2d 607, 106 A.L.R. 1169; *Arizona ex rel. Gaines* v. *Cooper Queen Consol. Min. Co.*, 233 U. S. 87, 58 L. Ed. 863; *Leather Mfrs. Nat. Bank* v. *Morgan*, 117 U. S. 96, 29 L. Ed. 811; *Metropolitan Life Ins. Co.* v. *Childs Co.*, 230 N. Y. 285; *N. Y. Rubber Co.* v. *Rothery*, 107 N. Y. 310; *Dickerson* v. *Colgrove*, 100 U. S. 578, 25 L. Ed. 618; *Daniels* v. *Tearney*, 102 U. S. 415, 26 L. Ed. 187; *Shean* v. *U. S. Fid. & Guaranty Co.*, 248 N. W. 892, 894; *In re Dimon's Est.*, 32 N. Y. S. 24, 239; *Delzell* v. *Odell*, 2 Hill 215, 225; *Pennell* v. *Henman*, 17 Barb. 644, 649; 19 *Amer. Jur., Estoppel*, p. 634.

[2] IX Brooklyn Law Review 245.

> In that case the receiver of a national bank sought to compel payment of a promissory note knowingly given to the bank by one of its directors so that the bank's purchase and retention of its own shares in violation of the National Banking Act would be concealed. The court, in sustaining the plaintiff's contention that the defendant should not be permitted to show that the parties never intended the note to be binding upon defendant, said that the facts presented did not justify an estoppel, as such, but that the policy of the Banking Act precluded the release from liability of makers of such fictitious notes. Plaintiff has not shown, and, indeed, does not contend, that Graham-Paige knowingly misstated the cost of and profit realized from the sale of the stock in issue here. Notes to all of the statements relied upon by plaintiff mentioned the fact that the cost of the stock as carried on the books was an 'assigned' value. The policy which controlled the Supreme Court's decision in the Deitrick case certainly finds no parallel in this one."

The Court of Appeals' second decision pointed out that in the *Dietrick* case, "The [Supreme] Court took pains to point out that estoppel was not the basis for striking the defense (309 U. S. 198)."

Petitioner now cites *D'Oench, Dhume & Co., Inc. v. Fed. Deposit Ins. Co.*, 315 U. S. 447, 86 L. ed. 956, for the same proposition. That case, which was factually similar to the *Dietrick* case and which relied upon it as authority, is even less applicable to the action at bar. There the defendant, in making a secret agreement that its promissory note should not be enforceable by the payee bank, devised a fraud, intentionally to deceive future creditors of the bank, of which the Federal Deposit Insurance Corporation, an instrumentality of the United States, subsequently became one. This Court decided that the case turned neither on the Illinois law relating to holders in due course, nor on the Missouri law of estoppel, but rather on the federal policy of protecting the F.D.I.C. and the public funds which it ad-

ministers, against fraud. There is no parallel in the case at bar.

Furthermore, Graham-Paige is not being sued on an instrument for the payment of money issued by it, as in the *Dietrick* and *D'Oench* cases.

Thus, even if the respondent had taken a prior inconsistent position (which it did not), there would be no estoppel.

As the Supreme Court held in *General Talking Pictures Corp. v. Western Electric Co., Inc.*, 304 U. S. 175, 178, 82 L. Ed. 1273, 1275:

> "There is nothing in the lower court's decision on either of the added questions to warrant review here. Whether respondents acquiesced in the infringement and are estopped depends upon the facts. Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it. Southern Power Co. v. North Carolina Pub. Serv. Co., 263 U. S. 508, 68 L. ed. 413, 44 S. Ct. 164; United States v. Johnston, 268 U. S. 220, 227, 69 L. ed. 925, 926, 45 S. Ct. 496. Moreover, the decision on that point rests on concurrent findings. They are not to be disturbed unless plainly without support. United States v. Chemical Foundation, 272 U. S. 1, 14, 71 L. ed. 131, 142, 47 S. Ct. 1; United States v. McGowan, 290 U. S. 592, 78 L. ed. 522, 54 S. Ct. 95; Alabama Power Co. v. Ickes, 302 U. S. 464, ante 374, 58 S. Ct. 300. There is evidence to support them."

It has been found by both lower courts that the facts do not support the claim of estoppel and they have held that petitioner's legal arguments are without merit. Accordingly the petition should be denied.

POINT II

The petitioner's second question is based on false premises and misstatements of fact. The courts below did not use the method asserted by petitioner in finding that respondent made no profit, or in evaluating its assets, but on the contrary used three separate bases including the willing-buyer-willing-seller rule.

The petition shows (on p. 3) that his second question is based upon the false assumption that the court relied upon the special value of the property to a purchaser so uniquely situated that he was willing to pay a price far beyond what anyone else would pay. It is also based upon the further false assumption stated (on p. 16) that there was no proper proof of the value of GP's intangible assets.

The assertions upon which the petitioner relies as the basis for his question, are contrary to the facts as found by the lower courts. Petitioner is, therefore, asking the Supreme Court to retry the facts. He incorrectly states the basis of the lower courts' decisions.

The Trial Court, both in its original decision and its decision on the remand, used three different methods to reach the finding that GP made no profit. In the petition, plaintiff completely ignores the first and second methods by which the court found, as a finding of fact, that no profit had been made, and contents himself with an attack only upon the third method used by the Trial Court. The first two methods employed by the District Court have not been questioned by the petitioner.

The first method employed by the District Court was based on the market value of the stock, which was listed and widely traded. In this connection the Trial Court said in its second opinion:

> "I begin, as I did before, with the highly significant circumstances that when defendant 'purchased' the

> Kaiser-Frazer stock it was selling on the market at 9⅝, that when defendant sold it it was selling at 7½, and that defendant actually realized 6¾. I hold that those circumstances constitute evidence that no profit was made."

On the second appeal the Court of Appeals said at page 481:

> "GP received stock selling at 9⅝ and sold it for 6¾, a loss of 2⅞. Appellant asks this court to accept the hypothesis that on the day GP acquired the stock it was only worth $3.94 as against a market of 9⅝. There is no basis whatsoever for any such conclusion."

Thus the first method resulted in a clear finding that no profit was made by GP.

The second method employed by the Trial Court in determining that GP made no profit, was the method previously used by the same court in *Truncale* v. *Blumberg*, D. C. S. D. N. Y. 1950, 88 F. Supp. 677, affirmed on opinion below, 2 Cir. 1950, 182 F. 2d 1021. That case held that the court was justified in treating the transaction as if GP had been paid, in exchange for the assets, sufficient cash for GP to buy the stock in the market at the market price. This method was marked out by Judge Clark of the Court of Appeals in his dissenting opinion in *Shaw* v. *Dreyfus*, 2 Cir. 1949, 172 F. 2d 140, 143. Judge Rifkind in the *Truncale* case, *supra*, at 679, referring to the *Shaw* case, said:

> "That case was concerned with the profits realized on the sale of warrants, evidencing the right to subscribe for stock, issued by a corporation to all stockholders in proportion to their stockholdings. Judge Clark there said 172 F. 2d page 143:
>
> > 'Of course computation of the amount of profit may be slightly more difficult than in the cases of direct purchase and sale. But I cannot see that it presents any insuperable difficulties. It

> seems to me but the ordinary task of valuing the security at its fair market price at the crucial dates of its acquisition and disposition.'
>
> "The effect of such a measurement is to treat the transaction as if, on December 12, 1945, the corporation had paid to defendants an amount of money sufficient to purchase such warrants and defendants had thereupon made the purchases. So to treat it seems to me to be sound practice. Clearly the value which the warrants then possessed was not the product of any short-term market activity engaged in by the defendants. It is profits realized from such short-term operations which the statute is designed to reach.
>
> "In the case at bar, the market price of the warrants on December 12, 1945, the date of acquisition, was greater than the market price at the time of the earlier sales. No profits, within the meaning of § 16(b), have been realized and no damages are recoverable."

Under this method of computation, it was found below that GP realized no profit, for at the time the stock was acquired its market price was 9⅝ and it was sold by GP for 6¾. It is clear that if stock is bought for 9⅝ and sold at 6¾, a loss, not a profit, results.

Petitioner has ignored the two methods above stated, used by the Trial Court in concluding that GP made no profit, and attacks only the third method used by the court to confirm the result. This method was to evaluate the assets which GP transferred to KF.

Petitioner, in his brief below, accused the Trial Court below of ignoring the instructions of the Court of Appeals given on the first appeal to apply the willing-seller-willing buyer rule to the problems of evaluating the assets which GP transferred to KF. He makes the same contention here. The petitioner is in complete error. At page 393 of the opinion on remand (149 F. Supp. 390), the Trial Court said:

> "Plaintiff points out that I have been admonished by the Court of Appeals to find the amount that a hypothetical willing buyer would pay to a hypothetical willing seller and claims that that amount would be far below the cost less depreciation at which it was carried on the books. While I admit the difficulty of judging what price nonexistent parties would trade at if they did exist, I know of no rule to support plaintiff's claim that it would be lower than cost less depreciation where an undivided interest in property used in a going concern was being sold. I regard the book value at which Kaiser-Frazer took the tangible assets into its accounts as 'other relevant evidence of the price which a buyer would pay' to which the trier of the facts must look in the absence of a market."

The opinion shows that the determination was made in the light of this rule. The rule was specifically referred to in the opinion twice on page 394, and again on page 395.

Plaintiff argues that the "informed guess" as to what a willing buyer would pay a willing seller must be made by the witnesses who testify as to their opinion of value. This is incorrect. The information must be given by the witnesses and the "guess" made by the Court. It is the Court who must make the determination as to what a willing-buyer would pay a willing-seller upon the assumption that they both exist.

The Trial Court followed *Westchester County Park Commission* v. *United States*, 143 F. 2d 688, 692, in which Judge Frank said:

> "As to 'value' in condemnation cases, the Supreme Court has said that often 'the application of this concept involves, at best, a guess by informed persons'. But that guess must have a rational foundation. And the owner of the land must supply *the court with materials for a guess* having such a foundation.'"

The "materials" were given to the Court, and the Court did apply the rule and made its "informed guess".

As to the willing-seller-willing-buyer rule of fair market value, Judge Learned Hand said in *Helvering* v. *Walbridge*, 70 F. 2d 683, 684, in speaking of fair market value:

> "In other connections the phrase has usually been defined as the price at which 'a willing buyer' and 'a willing seller' would exchange. * * * The gloss we have quoted we cannot accept; 'fair market value' is not nearly so universal a phenomenon as to justify such a comment, and the implication is misleading. Perhaps there need not be a 'market' to establish a 'market value,' but there must be some assurance that the value is what a 'market' would establish; and a 'market' itself presupposes enough competition between buyers and sellers to prevent the exigencies of an individual from being exploited. It may well imply that the goods have several possible buyers, so that a necessitous seller shall not be confined to one; and that there are several possible sellers of the same goods or their substantial equivalent, so that a hard-pressed buyer shall not have to accept the first offer. 'Willing' adds nothing, for, if the trade goes through at all, both must be willing, and the degree of their reluctance is not a serviceable measure."

The Court of Appeals upon the first appeal in this matter, in footnote 3, page 302, in 232 F. 2d, said:

> "The judge ruled that, because there could be but one buyer of the Graham-Paige assets, the willing-seller-willing-buyer rule of fair market value was inapplicable. Perhaps we need not consider that ruling in view of the ground of our decision. But it may be well to say that we think this ruling erroneous. The willing-seller rule is not abrogated by the absence of a market; the trier of the facts must look to other relevant evidence of the price which a buyer would pay."

So that twice, on the first appeal in this case, and in *Helvering* v. *Walbridge*, 70 F. 2d 683, the Court of Appeals has stated that where there is not an established or open market for assets, the rule requires the court to ignore the fact that there may be but a single buyer, and assume, as was said by Judge Hand, "that goods have several possible buyers, so that a necessitous seller shall not be confined to one; and that there are several possible sellers of the same goods, or their substantial equivalent, so that the hard-pressed buyer shall not have to accept the first offer."

This is the rule for which the plaintiff has been contending and the rule the courts below applied. Yet the plaintiff argues that the assets of GP had no real value because there was but one potential buyer, namely, KF. The rule requires the court to ignore (if it be a fact, and we deny that it is) that there was but one available buyer, and assume that the assets of GP were available not only from GP, but from others; and that not only KF, but others, were potential purchasers; and on this basis determine the fair market value of the assets in such hypothetical market.

As the Court of Appeals said on the first appeal, and on other occasions, under such circumstances "the trier of the facts must look to other relevant evidence of the price which a buyer would pay."

In *DeLa Rama S.S. Co.* v. *United States*, 206 F. 2d 651 (2 Cir. 1953) the Second Circuit ruled, page 655:

> "Absent a market price to use as a yardstick, it was proper to turn to other relevant factors. United States v. Miller, 317 U. S. 369, 63 S. Ct. 276, 87 L. Ed. 336."

The two principal factors which the Court used in that case were net earnings and reproduction costs—which are factors, among others, as to which GP's witnesses testified. The Court said in the *DeLa Rama* case, page 655:

> "Reconstruction cost less depreciation is an accepted guide to lead the way to the determination of the

value • • • when market value cannot be shown. Standard Oil Co. of New Jersey v. Southern Pacific Co., 268 U. S. 146, 45 S. Ct. 465, 69 L. Ed. 890 (and other cases.)"

In *Standard Oil Co. of New Jersey* v. *Southern Pacific Co.*, 268 U. S. 146, the Supreme Court ruled, at pages 155, 156:

> "Where there is no market value such as is established by contemporaneous sales of like property in the way of ordinary business, as in the case of merchandise bought and sold in the market, other evidence is resorted to. The value • • • properly may be taken to be the sum which, considering all the circumstances, probably could have been obtained • • • that is, the sum that in all probability would result from fair negotiations between an owner willing to sell and a purchaser desiring to buy (citation). And by numerous decisions of this court, it is firmly established that the cost of reproduction as of the date of valuation constitutes evidence properly to be considered in the ascertainment of value."

A summary of the facts competent to prove what a willing-buyer would pay a willing-seller is found in Professor Bonbright's treatise, *"Valuation of Property—A Treatise on the Appraisal of Property for Different Legal Purposes"* (McGraw-Hill, 1st Ed., 1937), at page 1016, in which he includes actual cost, replacement cost, sales, and earnings as indicia of value. These are established in the testimony and in the documentary evidence.

As to actual cost: KF conceded that more than $8 million was spent by GP as make-ready costs. A detailed summary of assets and other considerations given by GP in exchange for the stock is in evidence. It shows that the book cost of these assets and considerations, exchanged only for the stock (i.e., after deducting therefrom the face amount of the debentures) was $13,173,905, and even this figure is only partial, excluding, as it does, some of the

tangibles and all of the intangibles. The dealer and distributor organization which GP had built, alone cost $3 million to set up, and the national advertising of which KF received the benefit by the sale, cost another $2 million to $3 million.

As to replacement cost: GP's one-third interest in the Willow Run Plant could not be reproduced for $10 million.

As to sales: 135,000 automobiles were sold in 1947 and 1948, and 150,000 in 1949.

As to earnings: $19 million were earned in 1947, and $19½ million in 1948 before taxes.

GP's proof as set forth above satisfied the requirements of the willing-buyer-willing-seller test and showed that by such a standard of valuation the assets were worth more than enough to establish a cost for the stock exceeding the proceeds of sale, thereby establishing the absence of any profit on the sale of the stock. The Trial Court so found and the Court of Appeals affirmed.

The price a willing-seller would pay a willing-buyer is *not* what would be realized on a forced sale. Bonbright summarizes the law in this regard as follows, at page 841:

> "Despite the almost limitless number of meanings that the courts have attached to such phrases as 'fair value' or 'fair market value,' one negative doctrine has been so generally adhered to that it has become all but universal throughout the entire law of property—namely, that whatever else value may mean, it does *not* mean the low price which property usually commands at a 'forced sale.' Instead, it is traditionally defined as the price at which the property *would* be sold to a 'willing buyer' by a 'willing seller.' "

Bonbright discusses the principle at length at pages 416, 56, and 703.

Throughout, plaintiff has attempted to devalue the assets of GP on the alleged ground that GP was virtually

forced to make a sale to KF. At the same time he contends that the willing-buyer-willing-seller rule is applicable. These positions are diametrically opposed, because the willing-buyer-willing-seller rule requires the court to fix fair market value on the basis of what a presumptive *willing-buyer* would pay a presumptive *willing-seller*.

The notion of a forced sale is alien to the very definition of *willing* buyers and sellers. This is conclusively shown by the definition set forth in the United States Treasury Regulations, Reg. 105, Sec. 81.10a:

> "The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell. The fair market value of a particular kind of property includible in the gross estate is not to be determined by a forced sale price."

In addition to all the automotive assets of GP, both tangible and intangible, KF received from GP a going business which as such had a value in addition to the aggregate value of the individual tangible and intangible assets.

The case of *East Bay Water Co.* v. *McLaughlin*, 24 F. Supp. 222, (N. D. Calif. 1938), is an illustration of the weight given to going concern value.

In that case the Commissioner of Internal Revenue claimed that the taxpayer had made a certain profit on the sale of its assets, computed by deducting from the proceeds of sale, the value of the assets sold. The taxpayer claimed the profit was smaller because the assets had greater value than allowed by the Commissioner. Taxpayer prevailed. The Court recited the law as set down by the Supreme Court (page 226):

> "The Supreme Court of the United States, in City of Omaha v. Omaha Water Co., 218 U. S. 180, 30 S. Ct. 615, 54 L. Ed. 991, 48 L. R. A., N. S., 1084 said (page 620):
>
> > 'The value, in equity and justice, must include whatever is contributed by the fact of the connec-

> tion of the items making a complete and operating plant. The difference between a dead plant and a live one is a real value, and is independent of any franchise to go on, or any mere good will as between such a plant and its customers.'
>
> Again, in the later case of Des Moines Gas Co. v. City of Des Moines, 238 U. S. 153, 35 S. Ct. 811, 59 L. Ed. 1244, the [Supreme] court pointed out that there is a great difference in a monopoly which owns a business already developed and one that must develop it; that the plant there being considered had developed all its parts which were performing their several functions in serving the public and working in harmonious operation, and proceeded to say (page 815): '*Going value*' or '*going concern value*', i.e., the value which inheres in a plant where its business is established, as distinguished from one which has yet to establish its business, has been the subject of much discussion in rate-making cases before the courts and commissions. Many of those cases are collected in Whitten on 'Valuation of Public Service Corporation' §§ 550-569, and the supplement to the same work §§ 1350-1385. That there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced is self-evident."

Later in the same opinion the District Court said:

> "I am not greatly impressed with the contention that the fact that plaintiff maintained its books in accord with the figures fixed by the Railroad Commission creates an estoppel. Book values may be some evidence of real value, but they are not binding or conclusive. Good-will and going concern value may have great value and yet not be reflected by the books at all. The same is true of easements, water rights, patents, and similar intangible property rights. But their inclusion in the book accounts at a certain value is little, if any, evidence of their true value, and their omission from the books does not estop the owner from claiming that which actually exists."

GP's proof, and the documentary evidence on the investment costs, production costs, past earnings, actual subsequent earnings, good-will, going concern value and the other intangibles overwhelmingly support a conservative valuation of $10 million for the intangibles and establish a cost for the stock greater than the proceeds of sale. This was found by the Trial Court and affirmed by the Court of Appeals as a matter of fact.

Therefore, the Trial Court clearly determined on three separate bases that as a matter of fact no profit was realized by GP.

This finding of fact was affirmed by the Court of Appeals on the second appeal. Judge Moore, writing for the court, said:

> "Upon *all* the proof presented including market value of the KF stock, the worth of the so-called intangible assets (although good dealer and distributor organizations would appear to be highly tangible) built up at considerable expense to GP and the assumption by KF of the obligation to pay an amount equal to the principal and interest on the GP debentures, we believe that GP has sustained its burden of proof."

At page 482, in concluding his opinion, Judge Moore says:

> "The sole issue is whether there was a profit on the sale of stock within the purview of section 16(b). We believe that GP has sustained the burden of proof that there was no such profit and accordingly affirm the judgment below."

Therefore, in its present status, this case contains findings of fact which have been affirmed by the Court of Appeals that no profit was realized. There is ample evidence in the record to support such findings.

This court in *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 477, 82 L. ed. 374, 377, said:

> "These findings were made, after hearing, by the district judge upon undisputed or conflicting evidence. The findings were not questioned by the court below; and since they are not without substantial support in the evidence, we accept them here as unassailable."

To the same effect see: *General Talking Pictures Corp.* v. *Western Electric Co., Inc.*, 304 U. S. 175, 82 L. ed. 1273; *United States* v. *Chemical Foundation, Inc.*, 272 U. S. 1, 14, 71 L. ed. 131, 142. *See also, United States* v. *Johnston*, 268 U. S. 220, 227, 69 L. ed. 925, 926; *Houston Oil Company* v. *Goodrich*, 245 U. S. 440, 62 L. ed. 385; *Southern Power Company* v. *North Carolina Public Service Company*, 263 U. S. 508, 68 L. ed. 413.

POINT III

There is no intra-circuit or inter-circuit conflict with respect to the law of valuation.

Although petitioner claims that there is a conflict between the holdings of Judges Frank and Clark on the one side and Judges Lumbard, Waterman and Moore on the other with respect to the law applicable to the establishment of value, no such conflict in fact exists.

When this matter came to the Court of Appeals on the first appeal, the Trial Judge had held that it was the plaintiff's burden to establish that a profit had been realized. Judge Hincks, on other grounds, voted to affirm, but Judges Frank and Clark voted to remand because they were of the opinion that the burden of proof was not upon the plaintiff to show a profit, but on the defendant to establish the absence of a profit. In this connection in footnote 3, Judge Frank said:

> "The judge ruled that, because there could be but one buyer of the Graham-Paige assets, the willing-seller-willing-buyer rule of fair market value was inapplicable. Perhaps we need not consider that ruling in view of the ground of our decision. But it may be well to say that we think this ruling erroneous. The willing-seller rule is not abrogated by the absence of a market; the trier of the facts must look to other relevant evidence of the price which a buyer would pay. (citing cases)"

This is all that the court said about valuation on the first appeal.

When the case was remanded to the Trial Judge for the purpose of making a specific finding of fact as to whether the defendant Graham-Paige had sustained the burden placed upon it by the Court of Appeals to establish affirmatively that it realized no profit, the Trial Judge applied the law as set forth above. He did "look to other relevant evidence of the price which a buyer would pay", and he did determine that no profit was made in accordance with the direction contained in Judge Frank's opinion.

After this specific finding was made by the Trial Judge that the defendants had sustained the burden of proving that no profit was made, the matter again was appealed to the Court of Appeals, and that court, now consisting of Judges Lumbard, Waterman and Moore reviewed such finding and affirmed it.

The Court of Appeals in its opinion on the second appeal showed clearly that it, as well as the Trial Court, followed the instruction of Judge Frank to "look to other relevant evidence of the price which a buyer would pay." In its second opinion, the Court of Appeals said:

> "Where stock is acquired for property, tangible and intangible, the cost of the stock should be computed upon the value or worth of the assets delivered in exchange. The tangible assets are capable of fairly definite ascertainment. It is the intangible items which present the chief difficulty. That the

latter were an important part of the transaction is clearly supported by the proof. The directors of KF prior to approving the delivery of 750,000 shares to GP had considered the fact that GP 'since September of 1945 had incurred a cost in excess of $8,000,000.00 in the development of the automobile business, building up a dealer and distributor organization and making the trade name "Frazer" known to the public through a national advertising campaign', and 'would derive the benefits from the "going concern value" which had been built up by Graham-Paige Motors Corporation through the expenditure of this sum.' In addition 'Graham-Paige Motors Corporation had the right to use one-third of the capacity of the Willow Run Plant which right would be an extremely valuable one as soon as the production of automobiles was such as to enable the operators of the plant to make a profit.' (Bd. of Dir. Min., Dec. 3, 1946, Ex. A.)

"There was also testimony that the GP dealer and distributor organization acquired by KF had cost GP some three million dollars to set up and that it was actually worth substantially more; that large sums had been expended by GP on national advertising of which KF received the benefit; that patent rights were of value; and that the 'going concern' value was worth many millions to KF."

Consequently, there is no intra-circuit conflict. The Court of Appeals as constituted on each appeal agreed that in the absence of a market "the trier of the facts must look to other relevant evidence of the price which a buyer would pay." On the first appeal the Court of Appeals stated this principle and on the second appeal the Court of Appeals applied it.

Petitioner's contention that there is an intra-circuit conflict fails because there is no inconsistency between the instruction of Judge Frank and the same court's affirmance of the method used by the Trial Court. Petitioner has shown no such conflict between circuits, and there is none. There is no reason why the writ should be granted.

CONCLUSION

Because there is no intra-circuit or inter-circuit conflict; because the judgment is correct as a matter of law and fact; and because petitioner is seeking to have this Court review questions of fact decided and affirmed against him below, the petition for a writ of certiorari should in all respects be denied.

Respectfully submitted,

AMBROSE V. MCCALL,
Attorney for Respondent,
Graham-Paige Motors Corporation.

WM. FRANCIS CORSON,
SOL I. SOKOLSKY,
of Counsel.

APPENDIX

Opinion of District Court on Remand, Decided March 12, 1957, Reported at 149 F. Supp. 390

DIMOCK, *D. J.*

This action under section 16(b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78p(b), which gives a right of recovery of "short swing profits" made by insiders, was tried before me. After trial I filed an opinion, 132 F. Supp. 100, in which I held that plaintiff had made prima facie proof that defendant Graham-Paige Motors Corporation had made a profit of $434,787.86 on a "short swing" purchase and sale of stock of defendant Kaiser-Frazer Corporation. I further held, however, that plaintiff had not only the burden of making prima facie proof of profit by Graham-Paige but also the burden of establishing the fact of profit by a preponderance of the evidence. This burden of establishing profit by a preponderance of the evidence I held plaintiff had not sustained and I consequently denied recovery.

The Court of Appeals held on appeal, however, 232 F. 2d 299, 302, that I was wrong in holding that plaintiff, after establishing a prima facie case, continued to bear the burden of proof. The true rule, as I am instructed by the Court of Appeals, is that a "beneficial owner" who buys and sells within the statutory period is to be regarded as a fiduciary who violates his duty of loyalty and who must therefore account for his profits and that "once a cestui shows a breach of such duty and prima facie proof of a maximum amount of profits made by the fiduciary, then the fiduciary has the burden of proving to what extent the profits were less than this maximum—especially where the fiduciary's breach is responsible for the difficulty or impossibility of proving the amount with certainty—and that consequently, if the fiduciary's proof

leaves the amount uncertain, judgment goes against him for the maximum figure."

The case was therefore remanded to me with directions that I make a specific finding on the issue as to whether Graham-Paige discharged this burden of showing that and to what extent the profits realized were less than the maximum of $434,787.86 indicated by plaintiff's prima facie proof.

The parties have briefed this question and submitted it to me on the original record. I find that defendant Graham-Paige has discharged the burden of showing that no profits were realized.

The making of this finding requires a much more exhaustive consideration of the evidence than was necessary when I merely examined the question whether plaintiff had sustained the burden of proof that profit was made. Then it was unnecessary for me to determine whether or not Graham-Paige actually profited from the two transactions and I refused to make any finding on that question. Now I must examine the evidence in an attempt to do so.

I begin, as I did before, with the highly significant circumstances that when defendant "purchased" the Kaiser-Frazer stock it was selling on the market at 9⅝, that when defendant sold it it was selling at 7½, and that defendant actually realized 6¾. I hold that those circumstances constitute evidence that no profit was made. The directors of Kaiser-Frazer were under a duty to obtain full value for any stock which it sold. Those in control of Kaiser-Frazer were intimately familiar with the value of the Graham-Paige exchanged assets. There is thus a fair inference against Kaiser-Frazer that Graham-Paige paid for the stock what it would have cost in the market. True, such a large block would change hands either above or below the market if either the buyer or the seller was

under greater compulsion than the other. If both were equally desirous of putting the deal through, however, there is no reason to suppose that the sale would take place at other than the market price. Here I find that the parties were equally anxious to make the trade of stock and non-stock package item for the Graham-Paige exchanged assets hereinafter more fully described. Hence I infer and find that Graham-Paige paid at least 9⅞ for the stock. Since it sold at 6¾ it lost at least 2⅞ a share or a total of $445,625 on the 155,000 shares.

The same result is derived from the market prices by another method. As will hereinafter more fully appear, the Graham-Paige exchanged assets consisted of tangible and intangible items. If the cost of the stock is to be ascertained by appraisal of the exchanged assets and the non-stock package items, therefore, the trier of the facts is faced with the task of valuing intangible items like good will, an automobile design, production facilities and availability of distribution outlets.

Where there is no ready means of converting into dollars and cents "imponderables" that have been traded for securities later sold in a short swing transaction, the court will treat the transaction as though the imponderables had been sold for a sufficient amount of cash to buy the securities on the market and the money had been used for that purpose. That was Judge Rifkind's holding in *Truncale* v. *Blumberg*, D. C. S. D. N. Y., 88 F. Supp. 677, affd. on opinion below, *Truncale* v. *Scully*, 2 Cir., 182 F. 2d 1021. There persons surrendered their employment and bound themselves contractually to work for a corporation whose prospects at that time were far from promising. As part of the deal they received warrants. It would have been theoretically possible to determine what salary would have had to be paid to obtain the services of the employees if the warrants had not been turned over and then to find the cost

of the warrants by computing the excess of the hypothetical salary over the salary actually paid. Equating the cost to the market value was so much simpler and more accurate, however, that the court treated the transaction as though the corporation had paid the employees an amount of cash equal to the market price of the warrants and the employees had bought the warrants. Here I am admonished by the Court of Appeals that, though there was no market for the exchanged tangible and intangible assets, I must look to other relevant evidence of the price which a buyer would pay. That is difficult. One of defendant's experts stated that many of the intangibles were of "imponderable" value and that as to many he could not place a dollar amount on them and would not know where to find anyone who could. Finding the price that a buyer would pay here is certainly more difficult than finding the salary which would have had to be paid in the *Truncale* case if the warrants had not been turned over to the prospective employees. Thus I feel that I am justified, as an alternative method of determining the cost of the stock, in treating the transaction as if Graham-Paige had paid to Kaiser-Frazer sufficient cash to buy the stock at the market price. Here again, therefore, I infer and find that Graham-Paige paid at least 9⅝ for the stock and that the resale resulted in a loss of at least $445,625.

The ultimate question is not the value of the Kaiser-Frazer stock at the time that it was purchased but the then cost of that stock. Thus far, I have considered two legal theories each of which pointed to the fact that the cost of the stock was the same as its market value and thus to the fact that it was sold at a loss instead of at a profit. I feel that I must check this against the actual value of the property transferred by Graham-Paige as

the price of the Kaiser-Frazer stock. Indeed I am directed by the Court of Appeals to make such a valuation.

The cost of the stock to Graham-Paige is not necessarily the same as its market value. Various factors may result in a purchase at more or less than the market value. If the plaintiff in one of these short swing cases should show a purchase of $90,000 and a sale for $100,000 it would not avail the defendant to prove that the market value was really $110,000 at the time of the purchase.

To find the cost of the stock we must value the assets exchanged for the package which included the stock and then apportion the value of the exchanged assets between the stock and the non-stock items in the package.

As a starting point, I take the valuation at which Kaiser-Frazer placed the items on its books in recording the transaction. Kaiser-Frazer is the real party in interest on the plaintiff's side and its books of account can be used against plaintiff as admissions just as plaintiff used Graham-Paige's books of account as admissions against it to establish plaintiff's prima facie case of profit.

There follows a simplified statement of the entries made on Kaiser-Frazer's books as shown on Exhibit BB.

"Tangibles" (less trade and sundry accounts payable and accrued expenses assumed by Kaiser-Frazer)	$10,639,579.45	750,000 shares of Kaiser-Frazer stock	$ 4,875,000.
"Intangibles"	2,759,420.55	Assumption of payment of debentures	$ 8,524,000.
	$13,399,000.00		$13,399,000.

This represents a receipt of $4,875,000 for 750,000 shares of Kaiser-Frazer stock, or $6.50 a share. Thus if Kaiser-Frazer's books were accepted at their face value there would be an indicated profit of $.25 a share on the 155,000 shares sold at 6¾ or $38,750. Neither plaintiff nor defendant is willing to accept the books at their face value, however. To begin with, although the item for tangibles is as recorded on Kaiser-Frazer's books, plaintiff attacks it on the ground that it represents largely an undivided ⅓ interest in equipment installed in a plant used jointly by Kaiser-Frazer and Graham-Paige or in the plants of suppliers. Plaintiff points out that I have been admonished by the Court of Appeals to find the amount that a hypothetical willing buyer would pay to a hypothetical willing seller and claims that that amount would be far below the cost less depreciation at which it was carried on the books. While I admit the difficulty of judging what price non-existent parties would trade at if they did exist, I know of no rule to support plaintiff's claim that it would be lower than cost less depreciation where an undivided interest in property used in a going concern was being sold. I regard the book value at which Kaiser-Frazer took the tangible assets into its accounts as "other relevant evidence of the price which a buyer would pay" to which the trier of the facts must look in the absence of a market. See, *Stella* v. *Graham-Paige Motors Corporation*, 2 Cir. 232 F. 2d 299, 302, footnote 3. I therefore find the value of the tangible assets transferred to have been $10,639,579.45.

That brings me to the intangible assets which were placed on the Kaiser-Frazer books at $2,759,420.55. I do not shut my eyes to the fact that this figure was arrived at by (a) valuing the stock at 6½ on the theory that the market value at the time of the appraisal was 8 and that the net proceeds of the sale of 750,000 shares to the public

would not have been more than $6.50 a share, (b) valuing the assumption of payment of the debentures at par or $8,524,000 and (c) subtracting from the total the value of the tangibles. While the book value of the intangibles is thus a balancing figure, it is nevertheless the value placed upon them by Kaiser-Frazer, the real party in interest on the plaintiff's side. I therefore treat that figure as actual for the purposes of this short swing profit case just as I treated Graham-Paige's book figure for the purchase price of the stock as actual although it was only a balancing figure arrived at by deducting the value of the assumption of the debentures at par from the value of the tangibles and, for consistency with income tax treatment, disregarding the intangibles.

Moreover Kaiser-Frazer's book value for the intangibles cannot be regarded as a mere balancing figure. At the meeting of the Board of Directors of Kaiser-Frazer on December 3, 1946, at which the issuance of the stock for assets formally valued at $4,875,000 was approved, Henry J. Kaiser, the Chairman of the Board, stated that it might be said that the corporation was issuing the stock in exchange for $2,100,000 and the intangible assets. This would put a value of $2,775,000 on the intangibles. The minutes continue,

> "The principal consideration, however, of the Board was given to the value of the intangible assets of Graham-Paige Motors Corporation and the actual worth of the 750,000 shares of stock which were to be issued. In regard to the intangibles which the Corporation would receive from Graham-Paige Motors Corporation it was pointed out that the latter corporation since September of 1945 had incurred a cost in excess of $8,000,000 in the development of the automobile business, building up

> a dealer and distributor organization and making the trade name "Frazer" known to the public through a national advertising campaign. If the Corporation purchased the automotive assets of Graham-Paige Motors Corporation, it would derive the benefits from the 'going concern value' which had been built up by Graham-Paige Motors Corporation through the expenditure of this sum. Furthermore, under said contract dated September 20, 1946, Graham-Paige Motors Corporation had the right to use one-third of the capacity of the Willow Run Plant which right would be an extremely valuable one as soon as the production of automobiles was such as to enable the operators of the plans to make a profit. Consequently, the so-called intangible property of Graham-Paige Motors Corporation which the Corporation would receive under the proposed purchase of automotive assets had considerable value."

As appears from my earlier opinion in the case, 132 F. Supp. 100, 107-8, defendant produced expert testimony that the intangibles had a value of the order of $10,000,000 and plaintiff adduced no evidence to the contrary.

Again plaintiff says that this intangible property was not salable. I find, however, that it stood precisely like the undivided interest in the tangibles for the purposes of valuation on a hypothetical willing-buyer-willing-seller basis. Following the same reasoning as in the case of the undivided interest in tangibles, I regard Kaiser-Frazer's book value and this expert testimony as "other relevant evidence of the price which a buyer would pay."

I therefore find the value of the intangible assets transferred to have been $2,759,420.55.

The total value of the transferred assets was thus $13,399,000. For these were exchanged the 750,000 shares of stock and the non-stock package items: (a) an agreement by Kaiser-Frazer to pay principal of and future interest on an issue of $8,524,000 of 4% Convertible Debentures of Graham-Paige due April 1, 1956, (b) an agreement by Kaiser-Frazer to pay the interest accrued on said debentures from October 1, 1946, to the closing date, (c) an agreement by Kaiser-Frazer to pay all of the fees of, and disbursements to be incurred by, the trustee and paying agent of said debentures from and after the closing date.

As appears from my earlier opinion, 132 F. Supp. 100, 109, an expert for Graham-Paige appraised this assumption as worthless. On the other hand Graham-Paige, by taking the assumption onto its books at par in recording the transaction, affords admissible evidence of that valuation. We are dealing with something for which there is no market and must therefore hunt elsewhere for evidence of what a hypothetical willing buyer would pay and a hypothetical willing seller would take. This involves "a guess by informed persons". *Westchester County Park Commission* v. *United States*, 2 Cir., 143 F. 2d 688, 692. I cannot accept the testimony of Graham-Paige's expert that the assumption was worth nothing. Nor can I accept Graham-Paige's book figure of par. The obligation could not have been worth more than fifty cents on the dollar because, just after the exchange, the market for the debentures themselves, with the benefit of Kaiser-Frazer's assumption, was only about 50. Indeed during January, 1947, before the assumption became effective, the low bid was 53 and during February, the month during which the assumption became effective, the low bid was 51. I think that the truth lies about midway between Graham-

Paige's book par and the expert's zero and I appraise Kaiser-Frazer's obligation at fifty cents on the dollar and find its value to have been $4,262,000.

The next of the non-stock package items is the obligation to pay accrued interest to the date of closing. That obligation would mature on April 1, 1947, instead of nine years thereafter as in the case of principal. While it would thus seem to have been worth par, or $124,299, it does not appear to have been specifically taken into account by Graham-Paige in setting up values upon its books so that we have no specific admission of its value as in the case of the assumption of the debentures. It may have been included in the valuation of the assumption of the debentures at par, however, so I find no admission that it was valueless and accordingly find its value to have been $124,299.

That leaves the last of the non-stock package items, the agreement by Kaiser-Frazer to pay all of the fees and disbursements of the trustee and paying agent of the debentures. Graham-Paige assigned no value to this agreement in recording the transaction. I cannot infer that it may have been included as part of the assumption of payment of the debentures themselves as I did in the case of the agreement to pay accrued interest. There is the evidence, in the form of an admission by defendant Graham-Paige, that the agreement was valueless. I cannot give full credence to that, however. My "informed guess" is that the fees and disbursements would average between $4,000 and $6,000 a year for nine years and that, allowing for Kaiser-Frazer's impaired credit and for discount for future payment, the obligation had a value of $25,000.

To recapitulate, I have found the following values:

Tangibles	$10,639,579.45	Assumption	$4,262,000.
Intangibles	2,759,420.55	Accrued interest	124,299.
		Fees & Expenses	25,000.
	$13,399,000.00		$4,411,299.

This means that non-stock items worth $4,411,299 and 750,000 shares of stock cost $13,399,000 . To find the cost of the 750,000 shares, the $13,399,000 must be apportioned between the stock and non-stock items. That should be done according to the respective values of the stock and non-stock items. The stock was selling at the time at 9⅝ so that its value was $7,218,750. Adding $4,411,299 as the value of the non-stock items we have a total of $11,630,049. There should thus be assigned to the stock 7,218,750/11,630,049 or 62% of the cost. That amounts to $8,307,380 for 750,000 shares or $11.08 a share. Of this stock, 155,000 shares were sold at $6.75 resulting in a loss of $4.33 a share or $671,150. I find that to be the actual loss incurred by Graham-Paige from the acquisition and sale of 155,000 shares of Kaiser-Frazer stock.

This opinion is intended to embody findings of fact and conclusions of law in addition to those made upon the original hearing. The parties have made specific requests upon this application and I have passed upon them. My several denials are based upon the ground that the findings or conclusion requested was either not established or not relevant.

Dated: March 12, 1957

E. J. DIMOCK
United States District Judge

First Opinion of Court of Appeals and Dissenting Opinion of Circuit Judge Carroll C. Hincks, Decided March 29, 1956, Reported at 232 F. 2d 299

FRANK, *Circuit Judge*:

The facts are fully stated in the opinion of the district judge, reported in *Stella* v. *Graham-Paige Motors Corporation*, 132 F. Supp. 100.

1. The trial judge, we think correctly, adopted the reasoning of Judge Samuel Kaufman's decision, denying a summary Judgment, reported in 104 F. Supp. 957, in holding that Graham-Paige, for purposes of Section 16 (b), 15 U. S. C. § 78p, became the "beneficial owner" of 10% of the Kaiser-Frazer stock at the very moment when Graham-Paige purchased that stock. Before Judge Kaufman, the S. E. C. filed a brief as *amicus curiae* in support of what became Judge Kaufman's interpretation.

2. We agree with the trial judge that the purchase of the stock occurred on February 10, 1947, and that therefore sales made before August 8, 1947 were within the statutory period. The date when a purchaser becomes a "beneficial owner" is that on which he "incurred an irrevocable liability to take and pay for the stock," when his "rights and obligations became fixed." *Blau* v. *Ogsburg*, 2 Cir., 210 F. 2d 426, 427. Here Graham-Paige was to pay, in part, $3,000,000 in cash. It did not have that sum when the contract with Kaiser-Frazer was made but in the contract agreed to use its best efforts to borrow that sum from a certain bank in accordance with a letter agreement. This letter agreement provided that the bank's obligation to make the loan was on condition that the Henry J. Kaiser Company would guaranty it. The agreement with Kaiser-Frazer provided, in effect, that, if Graham-Paige was unable to obtain the loan from the bank in accordance with

the letter agreement, Graham-Paige had the election to terminate the agreement with Kaiser-Frazer. As the trial judge said [132 F. Supp. 105]: "There is no evidence * * * that the Henry J. Kaiser Company became bound to execute the guaranty at any time prior to the closing meeting on February 10, 1947, when it did so." It follows that, until that date, Graham-Paige had not incurred "an irrevocable liability to take and pay for the stock." [1]

In *Blau* v. *Ogsbury, supra,* the question was when the holder of an option to buy stock became the "beneficial owner." We held that it was not (a) the date when he acquired the option, nor (b) the day when, having exercised it, he paid for the stock and obtained legal title to it, but (c) the day when he exercised the option with the result that he had then a fixed right and obligation under an executory contract. See also *Park & Tilford* v. *Schulte,* 2 Cir., 160 F. 2d 984, 987 where we said that, upon the exercise of an option, the optionee becomes an "insider" and thus within the Congressional purpose to "protect the outside stockholders against at least short-swing speculation by insiders with advance information." Our reasoning was that one who holds an unexercised option is not usually in a position to obtain such information from the company. Here Graham-Paige, as long as it had an election to back out of the agreement to purchase, was not an "insider"

[1] Defendant argues that the word "purchase" in Section 16(b) must be defined according to Section 3(a) (13) which provides, "When used in this chapter, *unless the context otherwise requires* * * * the terms 'buy' and 'purchase' each include any contract to buy, purchase, or otherwise acquire." The words we have italicized destroy defendant's contention. For the relevant portion of Section 16(b) deals with a person who is directly or indirectly "the beneficial owner" of more than 10% of any class of any registered equity security. Since Graham-Paige was not irrevocably bound to purchase until February 10, 1947, it was not previously the "beneficial owner," directly or indirectly.

under Section 16(b). That election continued until the Henry J. Kaiser Company signed the guaranty of the loan on February 10, 1947.[2]

3. The trial judge found—we think correctly—that Graham-Paige's statements of profit in the amount of $434,787.86 sufficed to establish a prima facie case for plaintiff. Significantly, the judge refused to make a finding requested by defendant Graham-Paige, that there were no profits. But the judge apparently assumed that plaintiff, despite his prima facie case, continued to bear the burden of proving that there were profits and in what amount; therefore, as defendant's proof left the judge uncertain in this respect, he decided for the defendant. So we incline to understand the judge's reasoning as indicated, *e.g.*, by his statement that, "Plaintiff's prima facie proof * * * has been shown to be unacceptable."

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[2] The S. E. C.'s position on when a person becomes a "beneficial owner" by the purchase of stock coincides with our interpretation. In an opinion, the General Counsel stated:

> "In my opinion an officer, director or stockholder is to be deemed to have acquired beneficial ownership of a security at the time when he takes a firm commitment for the purchase thereof, and to divest himself of such beneficial ownership at the time when he takes a firm commitment for the sale thereof. If it is necessary that certain conditions be satisfied prior to the consummation of the purchase or sale, and if it is uncertain whether such conditions will be satisfied, then it would appear that the officer, director, or stockholder would not acquire beneficial ownership, or divest himself thereof, until such time as such conditions are satisfied and the undertaking to purchase or sell becomes a firm commitment." 11 Fed. Reg. 10968 (1946). See also, Cook and Feldman, Insider Trading Under the Securities and Exchange Act, 66 Harvard L. Rev. 385, 401-402; Rubin and Feldman, Statutory Inhibitions Upon Unfair Use of Corporate Information by Insiders, 95 U. of Pa. Law Rev. 468, 481-492 (1947).

If so, we think the judge erred. In *Gratz* v. *Claughton*, 2 Cir., 187 F. 2d 46 we held that, under Section 16(b), a "beneficial owner" who buys and sells within the statutory period is to be regarded as a fiduciary who breaches his duty of loyalty (*i.e.* his duty not to engage in self-dealing) and who, in such circumstances, must account for his profits. Elsewhere we have held that, once a cestui shows a breach of such a duty and prima facie proof of a maximum amount of profits made by the fiduciary, then the fiduciary has the burden of proving to what extent the profits were less than this maximum—especially where the fiduciary's breach is responsible for the difficulty or impossibility of proving the amount with certainty—and that consequently, if the fiduciary's proof leaves the amount uncertain, judgment goes against him for the maximum figure. See *Perlman* v. *Feldman*, 2 Cir., 219 F. 2d 173, 177, 178; *York* v. *Guarantee Trust Co. of New York*, 2 Cir., 143 F. 2d 503, 517; *Phelan* v. *Middle States Oil Corp.*, 2 Cir., 220 F. 2d 593, 600-601, 613; *President and Directors of Manhattan Company* v. *Kelby*, 2 Cir., 147 F. 2d 465, 476; *Upson* v. *Otis*, 2 Cir., 155 F. 2d 606; cf. *Bigelow* v. *R. K. O. Radio Pictures*, 327 U. S. 251, 265-266, 66 S. Ct. 574, 90 L. ed. 652; *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 51 S. Ct. 248, 75 L. ed. 544; *Package Closure Corp.* v. *Sealright Corp.*, 2 Cir., 141 F. 2d 972, 979.[3]

[3] The judge ruled that, because there could be but one buyer of the Graham-Paige assets, the willing-seller-willing-buyer rule of fair market value was inapplicable. Perhaps we need not consider that ruling in view of the ground of our decision. But it may be well to say that we think this ruling erroneous. The willing-seller rule is not abrogated by the absence of a market; the trier of the facts must look to other relevant evidence of the price which a buyer would pay. See *United States* v. *Toronto, Hamilton & Buffalo Nav. Co.*, 338 U. S. 396, 402, 70 S. Ct. 217, 94 L. ed. 195; *United States* v. *Miller*, 317 U. S. 369, 374-375, 63 S. Ct. 276, 87 L. ed. 336; *De La Rama S.S. Co.* v. *United States*, 2 Cir., 206 F. 2d 651, 655; *Westchester Park Comm.* v. *United States*, 2 Cir., 143 F. 2d 688, 692.

However, since it is not entirely clear what the judge would have found—as to whether Graham-Paige discharged its proof-burden—had he read the foregoing, in the interest of justice we remand with directions that he make a specific finding on that issue, in the light of what we have said above.[4]

HINCKS, Circuit Judge (dissenting):

I would affirm on the ground that the defendant's purchase and sale of Kaiser-Frazer stock was a transaction not within the scope of § 16(b) of the Securities Exchange Act of 1934, 15 U. S. C. A. § 78p(b).[1]

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[4] If, on the basis of such a finding, Graham-Paige is liable, interest should be added from the date of sale. See *Blau* v. *Mission Corp.*, 2 Cir., 212 F. 2d 77, 82.

[1] Section 16(b) of the Securities Exchange Act of 1934 provides:

"For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security if such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purchase of this subsection."

Immediately prior to its purchase of 750,000 shares of this stock the defendant was the owner of only 6¼% of the outstanding stock.[2] At that time, therefore, the defendant was not a "beneficial" owner within the meaning of § 16(a) of the Act wherein a "beneficial owner" is defined as a person who owns "more than 10 per centum of any class of any equity security * * *." So far there is no dispute. Section 16(b) reaches only the "profit realized by him [*i.e.*, the beneficial owner] from any purchase and sale or any sale and purchase of any equity security * * *." Since profit on purchased stock is not "realized" until its sale, this—the operative clause of the Section—standing alone might be read as applying to profit realized by a person who was a "beneficial owner" at the time of his sale, irrespective of his status as a beneficial owner at the time of his prior purchase of the stock. Apparently because it recognized that this might be taken as the meaning of the operative clause, Congress added a final sentence to § 16(b), shown in the text of the Section as printed in an earlier footnote, wherein it gave its own construction of the operative clause. It there said that the subsection "shall not be construed to cover any transaction where such beneficial owner was not such *both at the time of the purchase and sale* * * *." Although Congress did not supply the typographical emphasis appearing above, its language, especially when read in connection with the operative clause, plainly showed that it did in fact emphasize the very phrase that I have italicized. Thus in plain unambiguous language Congress said that the section does *not* apply to this defendant who though a beneficial owner at the time of sale "was not such both at the time of the purchase and sale."

I cannot go along with my brothers who adopt the reasoning and ruling of Judge Kaufman's opinion reported

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[2] See *Stella* v. *Graham-Paige Motors Corp.*, 104 F. Supp. 957.

in 104 F. Supp. 957, 959, which Judge Dimock took as stating the law of the case. In that opinion, it was said that "there is an ambiguity" in the exclusionary sentence quoted above and, later, that the alleged ambiguity was located in the phrase "at the time." This simple phrase was thought to afford a choice between two constructions, *viz.*: "prior to" on the one hand, or "simultaneously with" on the other hand. My brothers approve Judge Kaufman's choice of the latter "construction." On that basis they hold the transaction here involved to come within § 16(b). They thereby seem to commit the court to one or the other of these two propositions: (a) that any purchase by an outsider of a 10% interest in a stock equity gives rise to a conclusive presumption that the purchaser had inside information as to the affairs of the corporation, or (b) that a sale for profit by a "beneficial owner" of stock in his corporation may give rise to a conclusive presumption of a breach of fiduciary duty even though the seller was under no fiduciary duty at all when he had previously purchased the stock sold. Quite independent of my difficulty in believing that Congress could have intended to subject "beneficial owners" to conclusive presumptions of such drastic scope, I think that neither of the propositions posed above are tenable. For the simple language which my brothers find ambiguous is to me crystal clear. The grammar would have been better, but the meaning no clearer, if it had read "at the time both of the purchase and of the sale." Nobody points to other provisions of the statute or to anything in its legislative history which conflicts with the plain meaning.

To give any other "construction" to such language is, in my opinion, to attribute to Congress an intent at variance with that to which it gave expression. In the face of such clear language there is no need for courts to plumb the depth of the collective legislative mind and no power in

the courts to adjust the expressed intent of Congress to its supposed objective. In the case of *Lake County* v. *Rollins*, 130 U. S. 662, 9 S. Ct. 651, 652, 32 L. ed. 1060, it was said, "• • • where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction." In *Packard Motor Car Company* v. *National Labor Relations Board*, 330 U. S. 485, 67 S. Ct. 789, 792, 91 L. ed. 1040, the court said, "• • • it is for Congress, not for us, to create exceptions or qualifications at odds with its plain terms. • • • However we might appraise the force of these arguments as a policy matter, we are not authorized to base decision of a question of law upon them. They concern the wisdom of the legislation; they cannot alter the meaning of otherwise plain provisions. See also *Ex parte Collett*, 337 U. S. 55, 69 S. Ct. 944, 959, 93 L. ed. 1207; *Helvering* v. *City Bank Farmers Trust Company*, 296 U. S. 85, 56 S. Ct. 70, 80 L. ed. 62; and *Osaka Shosen Kaisha Line* v. *United States*, 300 U. S. 98, 57 S. Ct. 356, 81 L. ed. 532.

The opinion below cites *United States* v. *C. I. O.*, 335 U. S. 106, 68 S. Ct. 1349, 1352, 92 L. ed. 1849, wherein it was held that the word "expenditure" as used in §304 of the Labor Management Relations Act of 1947, 2 U. S. C. A. § 251, should be interpreted in the light of the Congressional purpose. But that was because the word "has no definitely defined meaning." Also cited was *S. E. C.* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344, 64 S. Ct. 120, 123, 88 L. ed. 88, for the proposition that "the purpose of Congress is a dominant factor in the determination of a statute's meaning • • • and *where a choice may be made between two possible constructions*, that construction should be chosen which would serve to effectuate Congressional purpose rather than defeat it." (Emphasis supplied.)

There the problem was whether the transaction in question came within the phrases "an investment contract" or "in general any interest or instrument commonly known as a security" as used in the definition of "security" in § 2(1) of the Securities Exchange Act, 15 U. S. C. A. 78b(1). The court spoke of these definitions as being "of * * * variable character", and "descriptive terms" which required interpretation "in conformity with its [the] dominating general purpose" of the Act. That case, too, I think not apposite here. For the exclusionary sentence of § 16(b) did not provide "two possible constructions," nor were its provisions couched in "descriptive terms" of "variable character."

My brothers' "construction" is apparently chosen because thought to be more consonant with the Congressional purpose "to protect the outside stockholders against at least short-swing speculation by insiders with advance information." *Shaw* v. *Dreyfus*, 2 Cir., 172 F. 2d 140, 142; *Park & Tilford Inc.* v. *Schulte*, 2 Cir., 160 F. 2d 984. I accept, of course, this statement of the Congressional purpose. Notwithstanding, I think that the construction adopted by the court is in direct conflict not only with the simple language of the Act but also with its basic rationale and scheme.

By the Act, Congress recognizes that officers and directors of a corporation generally have access to advance information as to its condition and prospects which when released to the public may sharply affect the market value of its stock. It seeks to hold these fiduciaries accountable to the corporation for personal profits made by them through trading in its stock *on the basis of such advance information.* And so, in recognition of the difficulty of proving that they actually had advance information which actuated their trading, the Act conclusively presumes that one who, while an *officer or director*, makes both *a purchase and sale* within so short a period as six months was actuated by advance information actually received. Congress recognized further that large stockholders also often have a dominant voice

in management and hence have access to advance information. Such stockholders, as well as officers and directors, thus have the qualifications of "insiders." Consequently, Congress adopted a provision whereby those owning 10% or more of the stock should as "beneficial owners" be included amongst the insiders, apparently thinking that provision to be at least roughly consonant with the realities of intracorporate relationships and desirable in that it would serve as an accurate definition of the class adequate for the guidance of the commercial public, and would facilitate the proofs necessary for enforcement litigation under the Act.

But the basic rationale of the Act was such that only completed swing transactions gave rise to the presumption of unethical use of advance information: if one purchased stock on one day, became a director on the next, and sold some of his stock on the next, any resulting profit was not recoverable by the corporation apparently because a sale alone was thought to be insufficient basis for a drastic presumption that it had been made in violation of a fiduciary duty. In principle, the same rationale is equally applicable to beneficial owners who do not become such until a given purchase is consummated. Under that rationale, the presumption will arise only when both the purchase and the sale were made by one who at the time was a fiduciary.

It is true that if the Act gives consistent effect to this rationale, it makes it possible for one who actually had advance information but was not a beneficial owner at the time of his purchase, to evade the Act, as was observed by Judge Kaufman in his opinion below. And under the same rationale, it excludes from accountability persons, like the defendant here, who until their purchases were consummated lacked even access to advance information. On the other hand, the Act, under my brothers' "construction" sanctions one or both of the propositions stated in an earlier paragraph of this opinion.

It was of course for Congress, not the courts, to weigh the conflicting policies affecting the scope which it should give to the Act. It decided to bring "beneficial owners" within the Act. But the extent to which they should be held accountable was unmistakably indicated by the final exclusionary sentence of § 16(b). It obviously thought it better, at least for the time being, to leave in the Act a loophole for some who, under the basic rationale, deserved to be held to accountability, than to suck into a suffocating dragnet many who, under the same rationale, could not justly be so held.

Original Opinion of E. J. Dimock, *D. J.*, Decided June 9, 1955, Reported at 132 F. Supp. 100

DIMOCK, *D. J.*

Michael Stella, a stockholder in Kaiser-Frazer Corporation, suing in behalf of himself and all other stockholders similarly situated, brings this action against Graham-Paige Motors Corporation under section 16(b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78p(b), quoted in part *infra*, which gives a right of recovery of short swing profits made by insiders. Kaiser-Frazer, having refused to bring this action after being requested to do so by plaintiff, is also named as a defendant.

Graham-Paige, in 1947, transferred its automotive assets to Kaiser-Frazer and received in return, 750,000 shares of Kaiser-Frazer stock and Kaiser-Frazer's agreement to pay principal, interest and trustee's and paying agent's service charges with respect to an outstanding issue of Graham-Paige's debentures. Later in the year Graham-Paige sold 155,000 shares of the stock so acquired. Plaintiff's theory is that Graham-Paige by the initial transaction became the holder of more than 10% of Kaiser-Frazer's outstanding stock so as to come within the purview of section 16(b), that there was a "purchase" and a "sale" of the 155,000 shares of stock within a "period of less than six months", that Graham-Paige realized a profit of $434,787.86 which is recoverable under the statute and that Graham-Paige is estopped to say that it did not realize a profit.

Graham-Paige resists plaintiff's claim on a number of grounds. First, that its acquisition of Kaiser-Frazer stock was not a "purchase" within the meaning of the statute and further that, if the statute were held to be applicable to this acquisition, it would be unconstitutional as so applied. Second, that the facts of this case bring it within a specific exception contained in section 16(b). Third, that in this case there was no "purchase and sale * * * within any

period of less than six months" within the meaning of that expression in the statute. Fourth, that, in any event, it realized no profit from the sale of the Kaiser-Frazer stock involved here. Fifth, that it is not estopped to say that it did not realize a profit.

I.

The Initial Transaction As a "Purchase".

Graham-Paige's argument that section 16(b) is not applicable here is without merit. It is based upon the contentions that the transaction by which Graham-Paige acquired Kaiser-Frazer stock was intended by Graham-Paige to be a sale of its automotive assets to Kaiser-Frazer rather than a purchase by it of Kaiser-Frazer stock and that Graham-Paige had no speculative intent at the time of acquisition. It is not at all clear to me that Graham-Paige would have been as satisfied to have had cash substituted for the stock which it received but, even assuming that this would have been the case, the acquisition of stock was a "purchase". Section 16(b) specifically excludes as a factor to be considered in cases arising under it the presence or absence of speculative intent at the time of the critical purchase or sale. See, Smolowe v. Delendo Corporation, 2 Cir., 136 F. 2d 231, 235-236, 148 A. L. R. 300. Graham-Paige cites only one case in support of the argument that its desire to sell assets rather than acquire stock prevents the acquisition from being a "purchase". That case, Roberts v. Eaton, 2 Cir., 212 F. 2d 82, involved a reclassification of outstanding stock binding upon all stockholders. The Court of Appeals, in affirming the lower court's decision for defendant, said, at p. 86, that "[t]he reclassification * * * could not possibly lend itself to the speculation encompassed by § 16(b). The court gave no

consideration to subjective factors such as those which Graham-Paige would have me consider here. Thus the Roberts case is not apposite.

Graham-Paige admits that section 16(b) has been held to be constitional and fails to give any reason for its assertion that application of the section here would be unconstitutional. I can think of no valid reasons in support of the argument and I therefore reject it.

I find that Graham-Paige's acquisition of 750,000 shares of common stock of Kaiser-Frazer was a "purchase" of said stock within the meaning of section 16(b).

II.

Purchaser's Ownership of 10% at Time of Purchase.

Graham-Paige's argument that the transaction at bar is within the specific statutory exception of section 16(b) is based upon the following language in that section:

> "This sub-section shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale * * * ".

The argument is that, since Graham-Paige was not the beneficial owner of 10%, see section 16(a) of the Act, 15 U. S. C. § 78p(a), of Kaiser-Frazer stock before the time of the purchase, the transaction is exempted. This argument, presenting a pure question of law, was made to Judge S. H. Kaufman by Graham-Paige in support of a motion for summary judgment in this case. He rejected it and denied summary judgment for reasons which convince me. Stella v. Graham-Paige Motors Corp., D. C. S. D. N. Y., 104 F. Supp. 957. His decision is the law of this case and I would not be free to disturb it even if I disagreed with it.

III.

The Transaction As Within the Short Swing Period

Section 16(b) provides in part:

> "(b) For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any *purchase and sale*, or any sale and purchase, of any equity security of such issuer (other than an exempted security) *within any period of less than six months*, * * * shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. * * *" (Emphasis supplied)

Graham-Paige argues that this language means that in order that any profit realized be recoverable by the issuer both the "purchase" and the "sale" must occur within a period of less than six months. I agree. That is exactly what the statute says.

Graham-Paige contends that the "purchase" and the "sale" here did not both occur within a "period of less than six months". If that is so I shall not need to decide whether or not Graham-Paige realized a profit. As part of its argument Graham-Paige construes the words "period of less than six months" to mean a period the first and last days of which each include the twenty-four hours from midnight to midnight, and the last day of which is the second day prior to the date corresponding numerically

to that of the first day of the period in the sixth succeeding month. For example, the period from and including January 1st to and including June 29th would be a "period of less than six months" but the period to and including June 30th would be a period of exactly six months. Thus profit realized from a purchase on January 1st and a sale on June 30th would not be recoverable under the statute.

That construction is correct. I cannot brush aside the congressional choice of the words "less than". To be less than six months the statutory period must be six months minus one full period from midnight to midnight since the law does not take into account fractions of a day. 2 Bl. Com. 141. This was the construction adopted without comment by Chief Judge Clark in Smolowe v. Delendo Corporation, 2 Cir., 136 F. 2d 231, 234, 148 A. L. R. 300, supra, where he described the statutory period as running from December 1st to the following May 30th—rather than to June 1st as the lower court had described it.

Plaintiff's argument that the statutory period embraces six months plus one day is based on decisions where the problem was to determine when a period of given length, reckoned "from" or "after" or "before" a date, began. Burnet v. Willingham L. & T. Co., 282 U. S. 437, 51 S. Ct. 183, 75 L. ed. 448; Cornell v. Moulton, 3 Denio N. Y., 12; Joint Counsel Etc., v. Delaware, L. & W. R. Co., 2 Cir., 157 F. 2d 417; Kimm v. Osgood's Administrator, 19 Mo. 60; Dutcher v. Wright, 94 U. S. 553, 24 L. ed. 130. Here the problem is to determine whether the two events occurred within any period of the given length. Fogel v. Commissioner of Internal Revenue, 5 Cir., 203 F. 2d 347, 348, which held that goods purchased on June 19th and sold on December 19th were not "held for more than six months", seems to me to represent a construction of that statute as meaning "held for more than six months *after the purchase*". It would be a contradiction in terms to construe this statute as meaning "purchase and sale within any

period of less than six months *after the purchase*". There could be no such thing as a purchase "within" a period that did not start until after the purchase.

To support an argument that the period includes at least a full six months plaintiff points to the fact that section 16(b) goes on to say that the profit shall be recoverable irrespective of the intention of the purchaser of holding the security sold "for a period exceeding six months." I regard the expression as a mere referential inaccuracy which cannot prevail over the language used by Congress in creating the cause of action. Graham-Paige is correct in saying that, to create liability for the profit realized, both the purchase and sale must have occurred within a period corresponding to that beginning at morning on January 1st and ending at night on June 29th.

Even though I agree with Graham-Paige's reading of the statute as to the period which it limits, I cannot agree with its contention that the purchase and sale here did not occur within that period.

Sub-sections (a)(13) and (14) of section 3 of the Securities Exchange Act of 1934, 15 U. S. C. §§ 78c(a)(13), 78c(a)(14), read:

> "(13) The terms 'buy' and 'purchase' each include any contract to buy, purchase, or otherwise acquire.
>
> "(14) The terms 'sale' and 'sell' each include any contract to sell or otherwise dispose of."

Until a contract is a firm commitment, *i.e.*, until both parties are bound, there is no "purchase" or "sale" under the Act. *Blau* v. *Ogsbury*, 2 Cir., 210 F. 2d 426. Graham-Paige argues that in the case of a purchaser there is a "purchase" when he knows that he has a right to acquire a fixed number of shares at a fixed price and, in support of this theory, cites the following language from the *Ogsbury* case, page 427:

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> "It matters not to the speculator who has title or possession or who can vote the stock or receive dividends. What he needs is firm assurance that a fixed quantity can be acquired or disposed of at a fixed price; and his commitments are on that basis. And speculation, actual or potential, is the only vice within the purview of § 16(b). Other possible abuses of stock options do not now concern us."

Graham-Paige, in arguing that I should adopt the construction of this language favorable to its position, fails to take account of the fact that in that case the court held that the purchase occurred on the date of exercise of a stock option. On that date the buyer and the seller were bound. If the quoted language were to be read literally, the date of purchase would have been the date on which the option had been acquired, because on that date the purchaser knew that during the term of the option he had a right to acquire a fixed number of shares at a fixed price. Even before he exercised the option the purchaser was in a position to speculate. Graham-Paige's argument further fails to take account of this language, which appears at page 427:

> "* * * we agree with Judge Bondy that the 'purchase' was consummated * * * when Ogsbury mailed his notice of election and thereby incurred an irrevocable liability to take and pay for the stock."

In the present case the earliest date upon which both parties to the agreement pursuant to which Graham-Paige acquired 750,000 shares of Kaiser-Frazer stock were bound was February 10, 1947, the closing date. Up until that date the agreement, dated December 12, 1946, could have become operative only upon the occurrence of certain events, specifically provided for by its terms. One of these events was the transfer by Graham-Paige to Kaiser-Frazer, along with Graham-Paige's automobile business, of the sum of

$3,000,000. Graham-Paige did not have this cash and the agreement specifically provided that Graham-Paige would use its best efforts to borrow this amount from a certain bank, in accordance with a certain letter agreement between that bank and Graham-Paige, but that, if Graham-Paige were unable to obtain the loan in accordance with the letter agreement, it might elect to terminate the agreement with Kaiser-Frazer. The letter agreement provided that a condition of the bank's obligation to make the loan was that it would be guaranteed, jointly and severally, by Joseph W. Frazer, Graham-Paige's president, and the Henry J. Kaiser Company. Frazer executed the contract of December 12, 1946 so that he may be said to have been bound to execute the guarantee. There is no evidence, however, that the Henry J. Kaiser Company became bound to execute the guaranty at any time prior to the closing meeting held on February 10, 1947 when it did so. To come within the same less-than-six months' period with the purchase, therefore, the sale would have to have taken place on or before August 8, 1947.

I pass to the question of the date of the sale. The sale of the 155,000 shares of Kaiser-Frazer stock took place in three transactions: a block of 10,000 shares was sold to one Frederick Lewisohn, a block of 45,000 shares was sold to investors through Otis & Company and a block of 100,000 shares was sold to Permanente Metals Corporation, a corporation substantially owned and controlled by Henry J. Kaiser. A firm contract for the sale of 10,000 shares to Lewisohn was executed by both parties on August 5, 1947. There was a misunderstanding about the Otis sale. Otis & Company purported to sell the stock to customers as agent for Graham-Paige in two blocks, one of 40,000 shares on August 4th, and one of 5,000 shares on August 5th. When Graham-Paige received confirmations on August 6th, Jennings, its secretary, telephoned Otis & Company and said

that the sale would have to be to, rather than through, Otis, because of requirements in connection with the Securities Exchange Commission. Otis convinced him that the sales had been made under circumstances that satisfied the requirements and wrote him a letter on August 6, 1947, detailing the facts. The Otis sales were thus ratified by Graham-Paige on either August 6th or the next day when the letter presumably arrived. The Permanente sale was embodied in a formal contract on August 5th. Thus on the face of things, the last of the contracts for the sale of the aggregate of 155,000 shares became binding, at the latest, on August 7, 1947.

Graham-Paige argues, however, that none of these purported contracts of sale were effective until Henry Kaiser authorized the release from a voting trust of 155,000 of the 750,000 shares that Graham-Paige had acquired in the manner above described. That authorization did not take place until the evening of August 8th.

I cannot see that Graham-Paige's inability to acquire a particular block of 155,000 shares to fulfill its commitments would have any effect upon those commitments as "sales" within the meaning of the statute. For example a contract for the sale of stock which the seller expected to fill by delivering stock which was subject to a pledge at the time of the making of the contract would result in a "sale" as of that time rather than as of the date that the seller succeeded in redeeming it from the pledge.

Graham-Paige makes another argument for fixing the date of sale at a time later than the making of the contract. The argument applies only to the 100,000 shares sold to Permanente. It is said that the contract was unenforceable because Henry Kaiser signed it on behalf of Permanente under a mistake as to its contents. The conclusion sought to be drawn is that the Permanente sale did not take place until the actual closing of the transaction on August 9th

or at least until August 8th when Henry Kaiser in effect expressed his willingness to carry out the contract by releasing from the voting trust 100,000 shares of Kaiser-Frazer stock for Graham-Paige to use in fulfilling its contract of sale to Permanente. Though the mistake appears to have been an honest one, the evidence is wholly insufficient to establish the circumstances necessary to make such a mistake the basis for the conclusion that the Permanente contract was void. I therefore hold that the Permanente sale took place on August 5th, within the same less-than-six months period with the purchase, rather than on August 9th, outside of that period.

Of the 155,000 shares sold, therefore, 10,000 shares were sold to Lewisohn on August 5, 1947, 100,000 shares were sold to Permanente on August 5th and 45,000 were sold to customers of Otis & Company, not later than August 7th. As appears above, the "purchase" took place on February 10, 1947, and the latest date within the same less-than-six months period was August 8, 1947. All of these dates thus fell within the time limited by section 16(b). I therefore cannot escape the necessity of determining whether a profit was realized.

V.

The Realization of a Profit.

Plaintiff has the burden of demonstrating that Graham-Paige has "realized" a "profit" from a "purchase and sale * * * within" a period of less than six months. Plaintiff charges that Graham-Paige made a purchase and a sale of 155,000 shares of Kaiser-Frazer stock within that period and realized a profit therefrom. Has plaintiff proved that a profit was realized?

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The determination of that question is not the simple matter that would be presented if Graham-Paige had bought the stock for X dollars and sold it for Y dollars. While the stock was sold for $1,046,250, it was acquired, not by paying a sum of money for it, but by exchanging a miscellaneous collection of assets for it. Worse still, the stock was not acquired by itself, but in a package deal in which other items were acquired en bloc with it.

An exchange of assets for stock constitutes a "purchase" within the meaning of the statute. See Shaw v. Dreyfus, 2 Cir., 172 F. 2d 140, 142; Park & Tilford v. Schulte, 2 Cir., 160 F. 2d 984, 987; Blau v. Hodgkinson, D. C. S. D. N. Y., 100 F. Supp. 361, 373-374; Truncale v. Blumberg, D. C. S. D. N. Y., 80 F. Supp. 677, 692. Thus any excess of the amount of cash finally realized on the sale of the stock over the value of the assets exchanged for the stock on its acquisition constitutes a "profit" within the meaning of the statute.

When the purchase of the Kaiser-Frazer stock was made it was selling in the market at 9⅝. When the sale was made it was selling at 7½. Certainly if the prices at which the purchase and sale were made were fixed with any regard to the market, plaintiff is wrong in claiming that a profit was made. See Truncale v. Blumberg, D. C. S. D. N. Y., 88 F. Supp. 677. The price at which the sale was made, 6¾, was close to the market, the reduction evidently having been made as an incentive to purchasers where such a large amount was offered. We ought to be justified in assuming that the purchase was made at a price near the market since the directors of Kaiser-Frazer would not have been justified in selling it below the market. The market price of Kaiser-Frazer shares at the time of the purchase is some evidence, therefore, of the dollar measure of the assets exchanged for them. As a matter of fact, the directors of Kaiser-Frazer had occasion to consider the per

share value of the stock as of December 3, 1946. The chairman of the board said at a meeting at that time that, since the book value was approximately $10 a share and the market value $8 a share, it was probable that the net proceeds of a sale of the 750,000 shares to the public would not be more than $6.50 a share and that figure was adopted for Kaiser-Frazer's bookkeeping purposes. By a parity of reasoning the maximum net proceeds of a sale to the public at the time of purchase, when the market price was 9⅝, would be somewhat higher than $6.50 a share, certainly high enough to equal the figure of 6¾ at which the 155,000 shares were sold. If we argue from the market price, therefore, Graham-Paige made no profit.

The problem may also be approached, however, by ascertaining the value of the assets exchanged for the stock. That involves first valuing the assets exchanged for the whole package, then valuing the non-stock items in the package, and then subtracting the latter valuation from the former to get the valuation of the stock item.

Following this method, plaintiff supported its allegation of a profit of $434,787.86 by offering evidence that the exchanged assets were worth $11,482,686.20, that the non-stock package items were worth $8,524,000 and that the stock consequently cost $2,958,686.20 or slightly less than $3.94½ per share as opposed to the $6.75 per share for which it was sold. Graham-Paige introduced evidence that the exchanged assets were worth well over $20,000,000 and the non-stock package items substantially nothing. This confronted plaintiff with the burden of showing that the true valuation of the exchanged assets was so low, and/or the true valuation of the non-stock package items was so high, that the actual cost of the 155,000 shares of stock was less than its selling price of $6.75 per share. Plaintiff has not met this burden.

The evidence has convinced me that the exchanged asset figure of $11,482,686.20 and the non-stock package items

figure of $8,524,000 are both so unreliable that I cannot say that the correct figure for the first is low enough and the correct figure for the second high enough to establish a purchase price less than the selling price of 6¾.

First let me consider the evidence as to the value of the exchanged assets which plaintiff says were worth no more than $11,482,686.20. That was the book value of the tangibles plus $737,654.51 for deferred assets.

Defendant introduced expert testimony to the effect that included in the exchanged assets were intangibles of substantial value which had not been taken into account in plaintiff's figures. Joseph W. Frazer, chairman of the board of directors of Graham-Paige at the time of the transactions involved in this case and conceded by plaintiff to be an expert in the field of automobile production and distribution, outlined defendant's efforts and expenditures made in its bid to reenter the automobile business after World War II. As early as 1945 defendant began to spend considerable sums of money on advertising in an effort to bring to public attention the name "Frazer", which was the name of defendant's automobile. Frazer testified that no less than $3,000,000 was invested by defendant in the organization of a distribution system. During 1945 and 1946 large sums of money were applied by defendant to design and development of a car that would be acceptable to the public. Frazer testified that these and other expenditures had resulted in the creation of good will, an automobile design, production facilities and availability of distribution outlets which were assets of great value. He said that the dealer organization was worth at least the $3,000,000 that it had cost to set it up, that the rights to the services of one Darrin as designer and the Darrin designs and patents which Graham-Paige owned were assets which he would not have sold for $1,000,000, that the national advertising was worth from $2,000,000 to $8,000,000.

He expressed his belief that the rest of the intangibles transferred were of great, though imponderable, value, and that to the whole should be added a going concern value so that the intangibles transferred would have been worth from $10,000,000 to $30,000,000 but for the lack of cash to carry on.

Mr. James D. Mooney, who qualified as an expert in the automobile business, having been in it for about 55 years and having been executive vice president of the General Motors Corporation and chairman of the Board of Willys-Overland Motors, Inc., testified that the intangibles were worth about $10,000,000.

There is evidence that Kaiser-Frazer too, considered the intangibles that it was to receive from Graham-Paige to be of great value. As early as December 3, 1946, the Board of Directors of Kaiser-Frazer discussed the proposed transaction. At that time they were willing to value the intangibles which Kaiser-Frazer would receive at $2,775,000 in determining that the consideration to be received from defendant was *at least equal* to the value of the stock to be issued to defendant.

Plaintiff did not attempt to adduce any evidence contrary to that adduced by Graham-Paige but satisfied himself with attacking Graham-Paige's evidence through cross-examination of Graham-Paige's witnesses and argument in his briefs submitted after trial. Thus plaintiff chose to rely upon the eventuality that I would refuse to give credence to the substantial amount of evidence adduced by Graham-Paige in opposition to plaintiff's prima facie case.

To meet Graham-Paige's evidence tending to show a substantial value for intangibles in the exchanged assets plaintiff argues in his brief that this evidence did not relate to the "market value" of the intangibles, that is, the amount realizable upon sale to a "willing buyer". However, in the

same brief, a few pages later, plaintiff admits that under the conditions obtaining at the time of the purchase there was no market for Graham-Paige's automotive assets, tangible or intangible. Plaintiff admits that Graham-Paige was, in fact, an "unwilling" seller and Kaiser-Frazer was in fact an "unwilling" buyer of the automotive assets. In the face of these admissions it hardly lies in plaintiff's mouth to demand proof of market value. When there is no market value it is proper to turn to other relevant factors in determining the value, see De La Rama S. S. Co. v. United States, 2 Cir., 206 F. 2d 651, and Graham-Paige introduced evidence of other factors which I do not think plaintiff has overcome.

Plaintiff has argued that, considered in terms of the "willing buyer" test, the fixed assets were overvalued in arriving at the $11,482,686.20 figure. He has not, however, offered evidence of the extent of such overvaluation. Anyway, as I have pointed out above, plaintiff having admitted, in fact asserted, that there was no "market" for what defendant exchanged, the "willing buyer" test is inapplicable. Courts cannot value assets for which there can be but one buyer by reference to what a hypothetical willing buyer would pay for them.

In the face of Graham-Paige's substantial evidence that intangibles not included in the book value of $11,482,686.20 had a value of the order of $10,000,000 I cannot find that the value of the exchanged assets was anywhere near as low as that book value.

So much for the valuation of the exchanged assets. Plaintiff's evidence of the value of the non-stock package items is just as unsatisfactory as his evidence of the value of the exchanged assets. The non-stock package items consisted of: (a) an agreement by Kaiser-Frazer to pay principal of and future interest on an issue of $8,524,000 of 4% Convertible Debentures of Graham-Paige due April

1, 1956. (b) an agreement by Kaiser-Frazer to pay the interest accrued on said debentures from October 1, 1946, to the closing date. (c) an agreement by Kaiser-Frazer to pay all of the fees of, and disbursements to be incurred by, the trustee and paying agent of said debentures from and after the closing date.

In making up its income tax return and on its books of account Graham-Paige valued Kaiser-Frazer's promise to pay principal of, and accrued and future interest on, the debentures at par, or $8,524,000. No account was taken of the value of the promise to pay service charges. Plaintiff has followed the same course in making up his claim.

Since plaintiff has offered no evidence of the value of the obligation to pay the service charges I can assign no value to it.

An expert in the valuation of securities testified for Graham-Paige that the obligation to pay principal of, and accrued and future interest on, the debentures was worth little or nothing in view of Kaiser-Frazer's precarious financial condition in February, 1947. In spite of the fact that Kaiser-Frazer had lost $19,200,000 in 1946, reducing its net capital and surplus to $34,400,000, I cannot give full credence to a zero valuation for the promise. The obligation to pay accrued interest would mature on April 1, 1947, and the amount payable was $124,299. It, without anything else, would seem to be worth par. Nevertheless the obligation to pay the debentures at their maturity in 1956 and 4% interest in the meantime certainly was not worth enough to put the total up to plaintiff's appraisal at par of the debentures. Moreover plaintiff's sole support for his appraisal at par is the treatment on Graham-Paige's books. Except for that I have no basis for criticising the expert's appraisal except my own skepticism. Since the result that we are seeking is the product of two variables it is impossible to say how much effect a change in only

one of them would produce. Taking an assumption for the purposes of turning one into a constant, however, and assuming as low a valuation for the exchanged assets as the $11,482,686.20 at which plaintiff appraises them in its claim, we would have to assign to the non-stock package items a figure at least as high as $6,420,186.20 in order to fix a purchase price for the stock that would equal the sale price. To show any profit, the non-stock package items would have to be valued even higher. If we deduct from the $6,420,186.20 the amount of the accrued interest of $124,299, we still have $6,295,887.20 as the necessary valuation of the promise to pay $8,524,000 of debentures. That would mean a price of almost 74 for a 4% obligation of the harnessed Kaiser-Frazer maturing nine years in the future. That is incredible in the light of expert testimony that such an obligation would have little or no value.

Plaintiff's prima facie proof of the value of the exchanged assets and the non-stock package items has been shown to be unacceptable. He has not met the burden of showing that the true valuation of the exchanged assets was so low and/or the true valuation of the non-stock package items was so high that the actual cost of the 155,000 shares of stock was less than its selling price of $6.75 per share.

VI.

Estoppel.

Plaintiff urges that Graham-Paige, by its reports of a profit to its stockholders, the SEC, the New York Stock Exchange and the Bureau of Internal Revenue, is estopped to deny that it realized a profit from the sale of stock.

Graham-Paige admits that in a number of its records a profit item appears and is attributed to the stock sale at

issue. These records may properly be considered as some evidence that a profit was realized and I have so considered them. Plaintiff goes further and says that Graham-Paige should not be permitted to now deny the correctness of the profit item.

While the prior statements were some evidence that Graham-Paige made a profit, they were not made in a form which would conclusively estop the declarant from denying that a profit was made, so that even assuming that some sort of estoppel would be operative if the statements had been wholly inconsistent, a very large assumption I believe, no estoppel can be applied here.

On each of the documents upon which plaintiff relies with one exception, Graham-Paige's 1947 tax return, there appeared a note which called attention to the fact that the figure booked as the cost to Graham-Paige of the stock which it acquired was an "assigned value". Further, in the financial statements in which the stock purchase was outlined it was pointed out that both the market price and Graham-Paige's net equity in Kaiser-Frazer represented by the stock were higher than the "assigned value" of the purchased stock. In view of the fact that this "assigned value" was derived merely by subtracting the face amount of the debentures which Kaiser-Frazer had promised to pay from the book value of the tangible and deferred assets given by Graham-Paige, and in view of the fact that it was expressly noted that the remainder was less than either the market value of the stock received or the net equity in Kaiser-Frazer which the stock represented, it is impossible for me to say that Graham-Paige represented that the remainder in the abovementioned calculation was, in fact, the cost of the stock which it acquired. It follows that the recording of a profit based on this "cost" was no representation that a profit, in fact, had been realized.

It is quite true that Graham-Paige, in its return for 1947, reported a capital gain on the sale of the stock. This

statement of a profit was, of course, unqualified. While at first glance this willingness to pay tax on a profit attributable to the sale of stock seems inconsistent with Graham-Paige's present position, study of the surrounding factors reveals that this apparent inconsistency is unreal. The intangibles which Graham-Paige has urged were a part of the consideration given by it were all derived from its efforts to re-establish itself in the automobile business after World War II. There were expenditures, for example, for advertising, design and establishment of a dealer system. These expenditures began very late in 1944 or early 1945. It appears that during these years the situation so far as Graham-Paige's automobile business was concerned was one of substantial amounts of money going out and nothing coming in. Production in quantities large enough to be profitable was not attained at the Willow Run plant until 1947 and, by February 1947, Graham-Paige had sold its automobile business to Kaiser-Frazer, its former partner in the Willow Run operation. As a result the expenditures, which Graham-Paige had made in 1945 and 1946 and now claims to have created valuable intangible assets, were reported as losses and expenses during those years for tax purposes. From the tax point of view it would have been improper for Graham-Paige to include in the consideration given for the stock any figures representing intangible assets since it had already deducted the sums expended in the creation of such assets from past income. Thus the fact that Graham-Paige's income tax profit differed from its actual profit is no more than an example of a phenomenon familiar to all.

Since I find that none of the statements cited by plaintiff are inconsistent with Graham-Paige's present position Graham-Paige cannot possibly be estopped to make its present stand.

Even if they were inconsistent, I do not think that a case of estoppel would be made out.

Plaintiff cites Deitrick v. Greaney, 309 U. S. 190, 60 S. Ct. 480, 84 L. ed. 694, as a case which controls in the circumstances here. In that case the receiver of a national bank sought to compel payment of a promissory note knowingly given to the bank by one of its directors so that the bank's purchase and retention of its own shares in violation of the National Banking Act, 12 U. S. C. § 21 et seq. would be concealed. The court, in sustaining the plaintiff's contention that the defendant should not be permitted to show that the parties never intended the note to be binding upon defendant, said that the facts presented did not justify an estoppel, as such, but that the policy of the Banking Act precluded the release from liability of makers of such fictitious notes. Plaintiff has not shown, and, indeed, does not contend, that Graham-Paige knowingly misstated the cost of and profit realized from the sale of the stock in issue here. Notes to all of the statements relied upon by plaintiff mentioned the fact that the cost of the stock as carried on the books was an "assigned" value. The policy which controlled the Supreme Court's decision in the Deitrick case certainly finds no parallel in this one.

Plaintiff cites also Holley Hill Citrus Growers Assn. v. Holley Hill Fruit Prod., 5 Cir., 75 F. 2d 13. There plaintiff, in promoting the organization of defendant, had by public statements, given to prospective investors in defendant reason to believe that defendant would succeed to certain trade marks of which plaintiff was the owner. The two corporations had, at the time of the organization of defendant, common officers. Plaintiff did not expressly assign the trade marks to defendant. Plaintiff's suit for infringement was unsuccessful. At least insofar as the real parties in interest, the investors in defendant, were concerned, all of the requirements for an estoppel in pais were present. The facts in the case at bar are wholly different.

Original Opinion of E. J. Dimock, D. J., Decided June 9, 1955, Reported at 132 F. Supp. 100

Plaintiff quotes the following language from Lewis v. Atlas Corporation, 3 Cir., 158 F. 2d 599, 602: "Plaintiff can hardly be in a position of asserting the existence of an agreement before a public regulatory body and denying it before a court" and says that it is authority for the proposition that the doctrine of estoppel by inconsistent position in proceedings before a court has been extended to include estoppel by inconsistent position in proceedings before the SEC. In the case at bar, the position alleged to have been taken by Graham-Paige with the SEC was not taken at an administrative hearing. Even if the Lewis case goes as far as plaintiff claims, therefore, it is not applicable here.

Thus I cannot agree with plaintiff that Graham-Paige is estopped to deny that it realized a profit on the sale of 155,000 shares of the common stock of Kaiser-Frazer.

I have studied the proposed findings of fact and conclusions of law submitted by both parties and have indicated my acceptance or rejection of each of them by notations in the margin. In passing on the requests to find I have in most instances denied without reference to the facts requests for findings as to the words or substance of written instruments or testimony and requests which seemed to me to seek only rulings on legal questions. Beyond those which I have accepted this opinion will constitute findings of fact and conclusions of law except to the extent that the parties choose to submit further specific ones to formalize those embodied herein.

Since I am not satisfied by the preponderance of the evidence that Graham-Paige realized a profit on its sales of 155,000 shares of the common stock of Kaiser-Frazer, I find for Graham-Paige and deny the relief which plaintiff seeks.

Dated: June 9, 1955.

E. J. DIMOCK,
United States District Judge.